163 U.S. 452

TRANSCRIPT OF RECORD.

163-452

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 637.

W. J. FAUST, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED JUNE 1, 1895.

15,926.

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1 In the District Court of the United States for the Northern District of Texas, at Waco.

Honorable John B. Rector, judge, presiding.

THE UNITED STATES } # 305. Charge: Embezzlement of Money-
vs. } order Funds.
W. J. FAUST. }

Be it remembered that at a regular and stated term of the said district court begun and held at Waco, Texas, on the second Monday of April, A. D. 1895, and ending on the 7th day of May, 1895, in a certain cause therein pending, in which The United States is plaintiff and W. J. Faust is defendant, the following papers were filed and proceedings had, to wit:

Indictment.

THE UNITED STATES OF AMERICA, } *To wit:*
Northern District of Texas, }

In the District Court of the United States within and for the Northern District of Texas.

In the name and by the authority of the United States of America, the grand jurors of the United States within and for the district aforesaid, at Waco, Texas, in said district, duly selected, impanelled, sworn, and charged to inquire into and true presentment make of all crimes and offenses cognizable under the authority of the United States committed within said northern district of Texas, upon their oaths present in open court that on the twentieth (20th) day of May, A. D. eighteen hundred and ninety-three (1893)—

One W. J. Faust, whose Christian name is to the grand jurors aforesaid unknown, at Thornton, in the county of Limestone, within the district aforesaid, was then and there assistant postmaster in a certain post-office theretofore established by the Postmaster General of the United States, to wit, the post-office at Thornton, in the county of Limestone, Texas, and as such assistant postmaster he, the said W. J. Faust, did then — there have in his possession, power, and control certain money-order funds of the United States,

2 consisting of, to wit, national bank notes, legal-tender notes, silver certificates, gold and silver coins of the United States of America, of the amount and value of, to wit, seven hundred and forty-four dollars and eighteen cents ($744.18), and he, the said W. J. Faust, being then and there in the possession of said money-order funds of the amount and value of seven hundred and forty-four dollars and eighteen cents, as such assistent postmaster at Thornton, did then and there unlawfully and feloniously embezzle the said money-order funds of the United States, and did then and there convert the said money-order funds described as aforesaid to

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Indictment.

THE UNITED STATES OF AMERICA, } *To wit:*
Northern District of Texas, }

In the District Court of the United States within and for the Northern District of Texas.

In the name and by the authority of the United States of America, the grand jurors of the United States within and for the district aforesaid, at Waco, Texas, in said district, duly selected, impanelled, sworn, and charged to inquire into and true presentment make of all crimes and offenses cognizable under the authority of the United States committed within said northern district of Texas, upon their oaths present in open court that on the twentieth (20th) day of May, A. D. eighteen hundred and ninety-three (1893)—

One W. J. Faust, whose Christian name is to the grand jurors aforesaid unknown, at Thornton, in the county of Limestone, within the district aforesaid, was then and there assistant postmaster in a certain post-office theretofore established by the Postmaster General of the United States, to wit, the post-office at Thornton, in the county of Limestone, Texas, and as such assistant postmaster he, the said W. J. Faust, did then — there have in his possession, power, and control certain money-order funds of the United States,

2 consisting of, to wit, national bank notes, legal-tender notes, silver certificates, gold and silver coins of the United States of America, of the amount and value of, to wit, seven hundred and forty-four dollars and eighteen cents ($744.18), and he, the said W. J. Faust, being then and there in the possession of said money-order funds of the amount and value of seven hundred and forty-four dollars and eighteen cents, as such assistant postmaster at Thornton, did then and there unlawfully and feloniously embezzle the said money-order funds of the United States, and did then and there convert the said money-order funds described as aforesaid to

his own use and benefit, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

J. W. PERKINS,
Foreman of Grand Jury.

THE UNITED STATES OF AMERICA, *Northern District of Texas,* } *To wit:*

In the District Court of the United States within and for the Northern District of Texas.

In the name and by the authority of the United States of America, the grand jurors of the United States within and for the district aforesaid, at Waco, Texas, in said district, duly selected, impanelled, sworn, and charged to inquire into and true presentment make of all crimes and offenses cognizable under the authority of the United States committed within said northern district of Texas, upon their oaths present in open court that on the sixth (6th) day of April, A. D. eighteen hundred and ninety-three (1893)—

One W. J. Faust, whose Christian name is to the grand jurors aforesaid unknown, at Thornton, in the county of Limestone, within the district aforesaid, was then and there assistant postmaster in a certain post-office theretofore established by the Postmaster General of the United States, to wit, the post-office at Thornton, in the county of Limestone, Texas, and as such assistant postmaster he, the said W. J. Faust, did then and there have in his, the said Faust's, possession, power, and control certain money-order funds of the United States, consisting of, to wit, national bank notes, legal-tender notes, silver certificates, gold and silver coins of the United States of America, of the amount and value of four hundred dollars ($400), and he, the said W. J. Faust, being then and
3 there in the possession of said money-order funds of the United States of the amount and value of four hundred dollars, as such assistant postmaster at Thornton, did then and there unlawfully and feloniously embezzle and convert to his, the said W. J. Faust's, own use and benefit the said money-order funds described as aforesaid, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

J. W. PERKINS,
Foreman of Grand Jury.

Endorsed: No. 305. The United States *vs.* W. J. Faust. Charge: Embezzlement of money-order funds. Presented and filed in open court this 21 day of Dec., 1893. J. H. Finks, clerk, by C. A. Richardson, deputy. A true bill. J. W. Perkins, foreman of grand jury. Eugene Marshall, United States attorney, northern dist. of Texas.

Plea of Misnomer.

In the District Court of the Northern District of Texas, at Waco, April Term, 1895.

THE UNITED STATES *vs.* W. J. FAUST. } No. 305.

And now comes W. J. Foust in his own proper person, who is indicted by the name of W. J. Faust, and, having heard the said indictment read, says that he was baptised in the name of W. J. Foust, and by that name always since his baptism hitherto has been called and known and by no other name has he ever been known or called, and this he, the said W. J. Foust, is ready to verify.

Wherefore he prays judgment of the said indictment, and that the same may be quashed.

W. J. FOUST.
PEARRE AND BOYNTON,
GARDNER AND ELLIS,
Attorneys for W. J. Foust.

Sworn to and subscribed by W. J. Foust before me this 20th day of April, A. D. 1895.

J. H. FINKS, *Clerk*,
By C. A. RICHARDSON, *Deputy*.

4 Endorsed: No. 305. The United States *vs.* W. J. Faust. Plea of misnomer. Filed, *nunc pro tunc*, April 16th, 1895. J. H. Finks, clerk, by C. A. Richardson, deputy.

Verdict.

In the United States Dist. Court for the Northern District of Texas, at Waco.

Verdict of the jury in the case of The United States *vs.* W. J. Faust.

We, the jury, find the defendant guilty as charged in the 2nd count of the indictment.

W. C. POOL, *Foreman*.

Endorsed: No. 305. U. S. dist. court. The U. S. *vs.* W. J. Faust. Verdict. Filed Ap'l 18, 1895. J. H. Finks, clerk, by C. A. Richardson, deputy.

From the Minutes, Thursday, April 18th, 1895.

THE UNITED STATES *vs.* W. J. FAUST. } 305. Charge: Embezzlement of Money-order Funds.

On the 16th day of April, 1895, this cause was called for trial, and came the defendant, in person and by attorney, and moved the court to quash the indictment in this cause on the ground that the defendant's name is W. J. Foust and not W. J. Faust, as it appears in the indictment, which motion, having been heard by the court, is in all things overruled, to which ruling the defendant excepted; and thereupon the defendant was called upon and permitted to suggest his true and proper name that the same might be inserted in the indictment and entered on the minutes of the court, declining to do which in open court when so requested the court ordered the case to proceed to trial against the defendant in the name which was written in the indictment. Then came the United States, appearing by its district attorney, W. O. Hamilton, Esq., and the defendant, appearing in his own proper person and by attorney, and both parties announced ready for trial; whereupon came a jury of good and lawful men, to wit, J. M. Blankenship, Jno. T. Wyse, W. H. C. Sheihagen, W. K. Sadler, J. M. Patton, W. W. Allen, Jackson Sullivan, W. C. Pool, Ed. Vanderford, F. E. Hill, W. S. Evans, and J. C. Lane, who were duly selected, empanelled, and sworn; the indictment was read and the defendant entered thereto a plea of not guilty. The jury, after hearing the indictment, plea, evidence, argument of counsel, and charge of court, retired to consider their verdict, in charge of the proper officer of the court, on this 18th day of April, 1895, and thereafter, on the same day, returned into open court the following verdict, to wit: "We, the jury, find the defendant guilty as charged in the 2nd count of the indictment. W. C. Pool, foreman." Which verdict, having been received by the court, was ordered to be filed and entered; and it is further ordered that the defendant be remanded to the custody of the marshal to await the sentence of the court.

And the further proceedings were had, to wit:

Sentence.

THE UNITED STATES *vs.* W. J. FAUST. } #305. Charge: Embezzling Money-order Funds.

WEDNESDAY, *May 1st*, 1895.

On this day the marshal brought into open court the defendant, W. J. Faust, in his own proper person, to receive the sentence of the court; and the said W. J. Faust, being asked by the court if he had anything to say why sentence should not now be pronounced upon him, says nothing. It is, therefore, adjudged by the court

that the defendant, W. J. Faust, is guilty of embezzling post-office money-order funds, as charged in the second count of the indictment and as found by the verdict of the jury; and it is ordered that the said W. J. Faust be, and he is hereby, sentenced to confinement in the penitentiary at hard labor for the term of five years and to pay a fine of four hundred dollars and all costs in this case incurred, for which let execution issue.

And the clerk of this court is directed to issue a commitment, addressed to the marshal of this district, commanding him to transport the said W. J. Faust, together with a certified copy of the judgment and sentence herein and of said writ, to the city of Columbus, in the State of Ohio, and there deliver the said W. J. Faust and said copies to the proper officer of the Ohio State penitentiary, there to remain until the sentence of the court as herein pronounced shall be executed.

6 *Assignment of Errors.*

In the United States District Court for the Northern District of Texas, at Waco.

THE UNITED STATES
vs. } # 305.
W. J. FAUST.

Assignment of errors.

Now comes W. J. Foust, defendant in the prosecution in said cause, being plaintiff in error on writ of error from said district court to the Supreme Court of the United States, and assigns as errors the following, to wit:

First assignment.

The court erred in overruling the defendant's plea of misnomer to the indictment herein filed on the 16th day of April, 1895, for the ground of objection therein stated, as fully appears by bill of exception then and there taken.

Second assignment.

There was introduced in evidence on the trial, over the objection of the defendant, by the Government a purported certified transcript from the money-order account books of the Post Office Department of the account of J. E. Foust, postmaster at Thornton, in the State of Texas; to the introduction of which testimony the defendant then and there excepted for the reason that said transcript did not purport to be a transcript from the money-order account books of the Post Office Department of the account of W. J. Faust, and could not tend to prove any issue in the case against W. J. Foust. See bill of exception No. 2.

Third assignment.

The court erred in refusing to permit the defendant to prove by J. E. Foust, postmaster at Thornton, that on 29th day of September, 1892, he forwarded to the postmaster at Waco, Texas, in proper form the sum of $170.00 in United States currency and $30.00 in a pension certificate or check, making in all the sum of two hundred dollars, the same being surplus money-order funds, and that said package was stolen *in transitu* and by Mrs. Helen Conger, postmistress at Waco, in 1892.

Defendant offered to prove that the said remittance never
7 reached Waco; that defendant offered to prove by J. W. Fuller that he counted said money and check or pension certificate and saw it deposited in jacket and placed in the post-office at Thornton; that on and prior to the day that said money-order funds were placed in the mail to be conveyed to the postmaster at Waco by the postmaster at Thornton and subsequent to that date one King Crain (now in the penitentiary) was the postal clerk on the mail train from Bremond to Albany, Texas. This registered package would have to go from Bremond to Waco on this route, and that said registry package containing said remittance, together with the $200.00 and the remittance sheet and return registry bill receipt, were embezzled by said King Crain, postal clerk as aforesaid; and the defendant offered in evidence four indictments against said King Crain, to wit, Nos. 297, 298, 299, and 300, charging him in the United States district court at Waco with the embezzlement of as many registered packages containing money in September, 1892, and proposed to offer in evidence the judgment of conviction in cases Nos. 297, 298, 299, consolidated on trial, and the sentence of the court; to the introduction of all which evidence the counsel for the Government objected, and the court sustained the objection and refused to admit the evidence. This testimony was material, for the reason that the purported transcript from the money-order account books of the department failed to credit the account of J. E. Foust, postmaster at Thornton, with this $200.00 remittance, which rendered said evidence admissible, notwithstanding the fact that the court restricted the finding of the jury to the $400.00 sent on the 6th day of April, 1893. All the testimony in reference to the shortage in the post-office money-order funds *were* admitted by the court, and he stated in his charge, "All the testimony admitted, whether mentioned by the court or not, is before you for your consideration." (See bill of exception No. 3.)

Fourth assignment.

The court erred in refusing to permit J. E. Foust to correct his testimony. The Government placed on the witness stand J. E. Foust, postmaster at Thornton in 1893 and father of the defendant, who testified that the defendant, W. J. Foust, just before he went to dinner on the 6th of April, 1893, handed to him into the post-office registered package No. 6; that witness placed it in a drawer,

and when defendant returned from dinner he (defendant)
8 asked witness for the registered jacket No. 6 addressed to postmaster — Waco and for the two others, one for Kosse and one for Galveston, which he (defendant) had handed witness at same time. Defendant said he wanted to get a hand-to-hand receipt from the postal clerk on the train, and that witness handed him said packages out of the drawer in which he had placed them when defendant handed them to him before he went to dinner.

Counsel for defendant cross-examined said witness, and court adjourned for dinner.

At the meeting of the court at 3 o'clock defendant placed said witness on the stand and offered to prove by said witness that he was mistaken when he said he had placed the registered packages in the drawer when his son, the defendant, handed them to him before the defendant went to dinner; that the fact was, and he now remembered it, that while defendant was going to dinner he, the witness, had put the registered packages in the mail pouch and locked the pouch, and when the defendant called for them on his return from dinner, and said he wanted them to take them to the train to get a hand-to-hand receipt for them from the postal clerk on the train. Witness remembered that he unlocked the pouch and took out the three packages and handed them to the defendant and relocked the pouch. To the introduction of which testimony the Government's counsel objected, and the court sustained the objection; to which ruling the defendant excepted then and there. (See bill of exception No. 4.)

Fifth assigument.

The court erred in his charge as a whole—

1st. Because the charge as a whole is misleading and did mislead the jury.

2nd. The charge as a whole took from the jury the vital point at issue in the case (to wit, "did the defendant send off to the post-office at Waco in jacket No. 6, containing $400.00, or did he send only registered letter No. 7 for Ed. Strauss in said jacket No. 6 and embezzle the $400.00"), and was decided by the court in his charge. (See bill of exception No. 5.)

Sixth assignment.

The court erred in failing to charge the jury that the em-
9 bezzlement (if any) must be proved to be without the consent of *his* defendant's principal or employer.

The court charge the jury on the law of embezzlement as follows: "If any officer, agent, clerk, or attorney at law or in fact shall fraudulently misapply or convert to his own use without the consent of his principal or employer any money or property of his principal or employer which may have come into his possession or under his care by virtue of such office, agency, or employment, he is guilty of embezzlement." The indictment fails to charge that defendant embezzled any money without the consent of his princi-

pal or employer, and there was no testimony tending to prove such fact.

The testimony showed the post-office at Thornton to be a fourth-class post-office, and the Government does not employ assistant postmasters for fourth-class offices; then the postmaster at Thornton, J. E. Foust, must have employed the defendant, and defendant was responsible to him (the postmaster) and not to the Government. (See bill of exception No. 6.)

Seventh assignment.

The court erred in that portion of his charge which reads as follows:

"It is clear under the testimony that the defendant was the assistant postmaster at Thornton, in Limestone county, Texas, and that the four hundred dollars which he is charged with embezzling came into his hands by virtue of his office, *ect.*"

This portion of the charge was error because there was no evidence introduced on the trial to warrant the conclusion of the judge that defendant was the assistant postmaster at Thornton, Limestone county, Texas. There was no evidence introduced on the trial tending to prove that Thornton was in Limestone county, or that Thornton was in the State of Texas. (See bill of exception No. 7.)

Eighth assignment.

The court erred in that portion of his charge which reads as follows:

"Did the defendant send off to the post-office at Waco in jacket No. 6 registered letter No. 6, containing $400.00, or did he send only registered letter No. 7 for Ed. Strauss in said jacket No. 6 and embezzle the $400.00? This is the vital question in this case and upon it turns the guilt or innocence of the defendant.

On the 6th day of April, 1893, the defendant made up a registry package and put it in jacket No. 6 and sent it to the postmaster at Waco. The package was duly received at the said place, receipted for on the registry bill that accompanied said registered package by the postmistress at Waco. This registry bill also came in jacket No. 6."

In this charge the court decides for the jury the only issue in the case, and by so deciding the court in effect states to the jury that Mrs. Wilber's testimony is the only testimony in the case for them to consider; in other words, the charge is equivalent to directing the jury to find the defendant guilty. (See bill of exception No. 8 for the evidence bearing upon this point.)

Ninth assignment.

The court erred in his charge to the jury in that he failed to present the *faze* of evidence which would have entitled the jury and required them to acquit the defendant; for which presentation reference is here made to the full text of the charge of the court con-

tained in bill of exception No. 5, it having been proved by the defendant, or proof tending strongly to prove that fact having been introduced by the defendant, that the defendant sent in jacket No. 6 to the postmaster at Waco two registry packages, to wit, registry package No. 6, containing the $400.00, and registry package No. 7, containing the remittance to Ed. Strauss at Waco; that he mailed same on the train at Thornton and exhibited his hand-to-hand receipt received from the postal clerk on train, and also registry-bill receipt, returned from Waco, signed by the postmistress at Waco, for said two registry packages inclosed by him in jacket No. 6; to which omission in said charge defendant in open court excepted and tendered his bill of exception No. 9. (See bill of exception No. 9.)

Tenth assignment.

The court erred in refusing to give special charge No. 1 asked by defendant. Reference is here made to the full text of said charge contained in bill of exception No. 10.

Eleventh assignment.

The court erred in refusing to give in charge to the jury
11 the special charge No. 2, to wit: "The Government in this case relies solely upon circumstantial evidence for a conviction of the defendant, and you are instructed in order to warrant a conviction of a crime on circumstantial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts (that is, facts necessary to the conclusion) must be consistent with each other and with the main facts sought to be proved, and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no other person committed the offence charged, and must exclude every reasonable hypothesis save the guilt of the defendant."

PEARRE & BOYNTON AND
GARDNER & ELLIS,
Attorneys for the Defendant.

Refused.
JOHN B. RECTOR, *Judge.*

See bill of exception No. 11.

Twelfth assignment.

The court erred in overruling the motion for a new trial filed by defendant on the 20th day of April, 1895, for the divers and several grounds of error therein stated:

1st. Because the court erred in his charge to the jury in failing to charge the law defining the offence of embezzlement as set forth in section 4046 of the Revised Statutes of the United States, the section under which both counts of the indictment were drawn.

2nd. The court erred in the fourth subdivision of its charge in charging that "it is clear under the testimony that the defendant was assistant postmaster at Thornton, in Limestone county, Texas," because there was no evidence in the cause to warrant such conclusion.

3rd. The court erred in its charge of the law of embezzlement.

4th. The court erred in summing up the evidence, in that he gave more and undue prominence to the testimony of Mrs. Wilber, the principal witness for the Government, that he did to the principal witnesses for the defendant, to wit, J. E. Foust, J. W. Fullen, G. W. Herod, R. W. Darwin, W. W. Sellers, and the defendant.

5th. The court erred in that portion of its charge in which
12 he said: "On the 6th of April, 1893, the defendant made up a registry package and put it in jacket No. 6 and sent it to the postmaster at Waco. The package was duly received at said place; receipted for on the registry bill that accompanied said registry package by the postmaster at Waco. This registry bill also came in jacket No. 6."

6th. Court erred in overruling defendant's plea of misnomer in the indictment.

7th. The court erred in omitting to charge the law governing circumstancial evidence and refusing the charge asked by the defendant on circumstancial evidence.

8th. The court erred in refusing the charge asked by defendant on venue.

9th. The verdict of the jury is contrary to the evidence and wholly unsupported by the evidence in the case.

10th. The charge of the court as a whole is calculated to mislead the jury and did mislead the jury.

Thirteenth assignment.

The verdict of the jury is contrary to the law and the evidence and wholly unsupported by the evidence in the case.

PEARRE & BOYNTON,
Attorneys for W. J. Foust.

Endorsed: No. 305. The United States *vs.* W. J. Faust. Assignment of errors. Filed May 2, 1895. J. H. Finks, clerk, by C. A. Richardson, deputy.

13 *Bills of Exception.*

In the United States District Court for the Northern District of Texas, April Term, A. D. 1895.

THE UNITED STATES
vs.
W. J. FAUST. } # 305.

Be it remembered that on the trial of the above numbered and entitled cause the Government offered evidence tending to sustain

the indictment, which in first count charged defendant, under the name of Faust, with being deputy postmaster at Thornton, Texas, with embezzing $744.18, and in second count with embezzling $400 of P. O. M. order funds, and the following bills of exceptions were taken by the defendant:

Bill of exception No. 1.

Be it remembered that on said trial the defendant, W. J. Foust, presented his plea of misnomer to the indictment in said cause as follows, to wit:

In the District Court of the Northern District of Texas, at Waco, April Term, 1893.

THE UNITED STATES }
vs. }
W. J. FOUST. }

And now comes W. J. Foust in his own proper person, who is indicted by the name of "W. J. Faust," and, having heard the said indictment read, says that he was baptized in the name of W. J. Foust, and by that name always since his baptism hitherto has been called and known, and by no other name has he ever been known or called; and this the said W. J. Foust is ready to verify. Wherefore he prays judgment of the said indictment and that the same may be quashed.

W. J. FOUST.
PEARRE & BOYNTON AND
GARDNER & ELLIS,
Attorneys for W. J. Foust.

Sworn to and subscribed by W. J. Foust before me this 20th day of April, 1895.

J. H. FINKS, *Clerk*,
By C. A. RICHARDSON, *Deputy*.

Which, having been heard by the court, was in all things overruled; to which ruling of the court the defendant then and there in open court did except and tendered this his bill of exceptions.

14 The indictment was read to the jury. Counsel for defendant arose and stated verbally that defendant's name was not Faust, but Foust, and asked that the indictment be quashed. The court held that Faust and Foust were *idem sonans*, and overruled defendant's verbal motion. Defendant excepted. At the suggestion of the United States attorney, the defendant was requested to suggest his true and proper name, in order that it might be inserted in the indictment and entered on the docket. The defendant in open court declined to do this, and the case proceeded to trial. The motion set out in this bill was never written and actually filed in this case until after the defendant was found guilty by the verdict, and leave was then granted.

Bill of exception No. 2.

Be it remembered that on the trial of the above numbered and entitled cause the Government introduced a certified transcript from the office of the auditor of the Treasury at Washington showing account of J. E. Foust, P. M. at Thornton, Tex., from October 10, 1891, to May the 20th, 1893, showing balance due of $744.18; to the introduction of which the defendant excepted in open court because said transcript did not purport to be a transcript from the money-order account books of the Post Office Department of the account of W. J. Foust, the defendant, and could not tend to prove any issue in the case against W. J. Foust; which objection, having been heard by the court, was in all things overruled; to which ruling of the court the defendant then and there in open court did except and tendered this bill of exceptions. It was proved on the trial that the defendant was the son of J. E. Foust, was assistant postmaster during the entire term of said J. E. Foust, and as such had the sole management, control, and possession of the money-order business and money-order funds during said entire term.

Bill of exceptions No. 3.

Be it remembered that on the trial of the above entitled and numbered cause the defendant offered to prove by J. E. Foust, postmaster at Thornton, that on the 29th day of September, 1892, he forwarded to the postmaster at Waco, Texas, in proper form, the sum of $170.00 in United States currency and $30.00 in a pension certificate or check, making in all the sum of $200, the same being surplus money-order funds, and that the same was stolen *in transitu* by Mrs. Helen
15 Conger, postmistress at Waco in 1892. Defendant offered to prove that said remittance never reached Waco. Defendant offered to prove that on and prior to the day that said money-order funds of September 29th, 1892, were placed in the mail to be conveyed to the postmaster at Waco by the postmaster at Thornton, and subsequent to that date, one King Crain was the postal clerk on the mail train from Bremond to Albany, Texas, which route said registry package would have to go, and that said registry package containing said remittance, together with the remittance sheet and return registry-bill receipt, were embezzled by said King Crain, postal clerk as aforesaid, and the defendant offered in evidence four indictments against said King Crain, to wit, # 297, 298, 299, and 300, charging him in the United States district court at Waco with the embezzlement of as many registered packages containing money in September, 1892, and offered in evidence the judgment of conviction in causes # 297, 298, 299, dated April, 1893, and the sentence of the court; to the introduction of all which evidence the counsel for the Government objected, and the court sustained the objection and refused to admit the evidence; to which ruling of the court the defendant then and there in open court did except and tenders this bill of exceptions. The Government objected to the offered evidence alluded to in this bill on the ground that it tended only to prove that another person other than the defendant in this

case at a time long anterior to the time of the commission of the offence as charged herein had committed another and different offence to the one herein charged, and the said other person had been indicted, and before the offence herein charged was committed, and was convicted on April the 19th, 1893, and the evidence was therefore held to be irrelevant and immaterial.

Bill of exceptions No. 4.

(Disallowed by the court.)

Bill of exceptions No. 5.

Be it remembered that on the trial of the above numbered and entitled cause the court charged the jury as follows:

16 THE UNITED STATES } # 305. Charge.
vs.
W. J. FAUST. }

In this case the jury are instructed that there are two counts in the indictment against defendant.

In the first count he is charged with embezzling ($744.18) seven hundred and forty-four dollars and eighteen cents. In the second count the defendant is charged with embezzling ($400.00) four hundred dollars.

"If any officer, agent, clerk, or attorney at law or in fact shall fraudulently misapply or convert to his own use without the consent of his principal or employer any money or property of his principal or employer which may have come into his possession or be under his care by virtue of such office, agency, or employment, he is guilty of embezzlement."

3rd. If under the testimony the jury believe that the defendant, on or about the 6th day of April, 1893, was assistant postmaster at a United States post-office at Thornton, in Limestone county, Texas, and that there came into his possession as such assistant postmaster about said time, at said place, certain money-order funds of the United States, consisting of national bank notes, legal-tender notes, silver certificates, gold and silver coin of the United States of the amount of ($400.00) four hundred dollars, and that the defendant did then and there, while so in possession of said money-order funds in his capacity as assistant postmaster at said place, wilfully and knowingly embezzle and convert to his own use said money-order funds of the United States, then you will find the defendant guilty under the second count of the indictment.

4th. It is clear under the testimony that the defendant was the assistant postmaster at Thornton, in Limestone county, Texas, and that the $400.00, which he is charged with embezzling, came into his hands by virtue of his office, and that he was entrusted by his father, the postmaster at Thornton, with the duty of sending it to the postmaster at Waco, Texas.

There is no dispute about the method to be pursued in sending

from Thornton to Waco, in April, 1893, surplus money-order
17 funds and how it was to be receipted for by the office at Waco.

Did the defendant send off to the post-office at Waco, in jacket #6, registered letter No. 6, containing $400.00, or did he send only registered letter No. 7, for Ed. Strauss, in said jacket No. 6 and embezzle the $400.00?

This is the vital question in this case, and upon it turns the guilt or innocence of the defendant.

On the 6th of April, 1893, the defendant made up a registry package and put it in jacket No. 6 and sent it to the postmaster at Waco. The package was duly received at said place, receipted for on the registry bill that accompanied said registered package by the postmistress at Waco. This registry bill also came in jacket No. 6.

Mrs. Wilber, the registry clerk in the post-office at Waco, on April 6, 1893, testified that she received the package or jacket No. 6 and found only one letter, which was addressed to Ed. Strauss and marked No. 7 on the registry bill.

That no other envelope except the Strauss package came in jacket No. 6, and that the registry bill contained in said jacket had on it No. 7, to Ed. Strauss, and did not have on it No. "6, P. M.," which now appears on said registry bill. Witness says she kept the registry book and opened jacket No. 6.

In each of the remittance letters of April 6th and 10th, 1893, by defendant appears the description of the same silver certificate for ten dollars, to wit: No. B9088457, 1886. These remittance letters are intended to describe the surplus funds remitted by a postmaster to his depository, which in the present case was at Waco for the post-office at Thornton.

In the remittance letter of defendant of April 6, 1893, appears the following: Ten silver, 1891, E760180, indicating that the ten-dollars silver certificate of that number and date had been sent to the depository at Waco. Witness Mayard swore that he got this bill on Apr. 14 or 15, 1893, when he and Fairchild went to Thornton; that he got it from a Mr. C. A. Hamilton. The witness C. A. Hamilton, of Thornton, swore that on April 15th, 1893, Mayard, J. E. Foust, and Fairchild came to his place of business, in Thornton, and demanded to inspect his money, and that among the bills he had they found the silver certificate for ten dollars, No. E760180;
that defendant had about a week previous to said occurrence
18 exchanged with witness some $220.00 in which he gave witness five and ten dollar bills for $20.00 bill.

Witness says that he does not know whether this bill No. E760180 was among the bills he handed over for inspection or not.

J. E. Foust, the father of defendant, testified that he examined the registry-bill receipt when it came back from Waco, and that it had on it then the entry of No. 6, P. M., & entry of No. 7, Ed. Strauss.

J. W. Fullen and G. W. Herod testify to counting the money and seeing defendant put it up, and R. W. Darwin and W. W. Sellers testify to accompanying the defendant to the depot, and that

he had jacket No. 6, and Darwin testifies that he said there were $400.00 in jacket No. 6. Defendant testified that he put up the $400.00 and sent it to the postmaster at Waco in jacket No. 6, and that the Ed. Strauss package was in same jacket No. 6. He says that when the registry bill came back from Waco receipted by the postmistress there, there was on it No. "6, P. M.," as well as "No. 7, Ed. Strauss."

The court has attempted to sum up the evidence in order to aid you, but you are the judges of what the evidence was and of its weight, notwithstanding what the court has said, and where your recollection as to what the evidence was differs from what the court has said you will be governed by your own recollection.

The court has not attempted to give all the details of the evidence, even of the witnesses named. All the testimony admitted, whether mentioned by the court or not, is before you for your consideration.

5th. You will acquit the defendant under count No. (1) one of the indictment.

If you have a reasonable doubt as to the guilt of the defendant you will give him the benefit of that doubt and acquit him.

If you find the defendant guilty, as charged in the second count of the indictment, then you will say, "We, the jury, find the defendant guilty as charged in the second count of the indictment."

If you do not find him guilty, as charged in the second count of the indictment, then you will say, "We, the jury, find the defendant not guilty."

JOHN B. RECTOR,
U. S. District Judge.

You are the judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them.

JOHN B. RECTOR, *Judge.*

19 This bill (No. 5) violates Supreme Court rule No. 4, and is therefore objected to.

W. O. HAMILTON, *U. S. Att'y.*

To which charge as a whole the defendant in open court then and there did except, and presented this his bill of exceptions for the reason- following, to wit:

1st. The charge as a whole is misleading.

2nd. The charge as a whole took from the jury the vital point at issue in the case, and was decided by the court.

Bill of exceptions No. 6.

Be it remembered that on the trial of the above numbered and entitled cause the court in its charge to the jury defined embezzlement as follows: "If any officer, agent, clerk, or attorney at law or in fact shall fraudulently misapply or convert to his own use without the consent of his principal or employer any money or property of his principal or employer which may have come into his posses-

sion or be under his care by virtue of said office, agency, or employment, he is guilty of embezzlement." In applying the facts of the case to the law of embezzlement, the court in its charge failed to charge that the embezzlement (if any) must be proved to be without the consent of his principal or employer; to which portion of the charge of the court the defendant then and there in open court did except and tender this his bill of exceptions.

Bill of exceptions No. 7.

(Disallowed by the court.)

Bill of exceptions No. 8.

Be it remembered that on the trial of the above numbered and entitled cause the court charged the jury as follows: "Did the defendant send off to the post-office at Waco, in jacket No. 6, registered letter No. 6, containing $400.00, or did he send only registered letter No. 7 for Ed. Strauss in said jacket No. 6 and embezzled the $400.00? This is the vital question in this case, and upon it turns the guilt or innocence of the defendant."

20 This portion of the charge of the court presents the issue, and the only issue, submitted to the jury by the charge of the court, and the court immediately proceeds to decide this single issue for the jury in his charge.

Immediately following the above-quoted portion, the court charges the jury: "On the 6th of April, 1893, the defendant made up a registry package and put it in jacket No. 6 and sent it to the postmaster at Waco. The package was duly received at said place, receipted for on the registry bill that accompanied said registered package by the postmistress at Waco; this registry bill also came in jacket No. 6." "Mrs. Wilber, the registry clerk in the post-office at Waco, on April 6th, 1893, testifies that she received the package or jacket No. 6 and found only one letter which was addressed to Ed. Strauss and marked No. 7 on the registry bill.

That no other envelope except the Strauss package came in jacket No. 6, and that the registry bill contained in said jacket had on it No. 7, to Ed. Strauss, and did not have on it 'No. 6, P. M.,' which now appears on said registry bill. Witness says she kept the registry book and opened jacket No. 6." In sum-ing up in his charge the testimony introduced by the defendant on the trial of this cause on this vital and only issue in the case the court says: J. E. Faust, the father of defendant, testified that he examined the registry-bill receipt when it came back from Waco, and that it had on it then the entry of No. 6, P. M., and the entry of No. 7, Ed. Strauss. J. W. Fullen and G. W. Herod testify to counting the money and seeing defendant put it up, and R. W. Darwin and W. W. Sellers testify to accompanying the defendant to the depot, and that he had jacket No. 6, and Darwin testifies that he said there were $400.00 in jacket No. 6. The defendant testified that he put up the $400.00 and sent it to the postmaster at Waco in jacket No. 6, & that the Ed. Strauss package was in the same jacket, No. 6. He says that when the reg-

istry bill came back from Waco, receipted by the postmistress there, there was on it "No. 6, P. M." as well as "No. 7, Ed. Strauss." In this sum-ing up of the testimony for defendant it is claimed that the court failed to call the jury's attention to the important facts bearing on the issue. J. W. Fullen, witness for defendant, testified that he was called upon by the defendant on the morning of April 6, 1893, to count surplus post-office money-order funds to be remitted
21 to the postmaster at Waco; that he counted for the defendant three hundred and seventy dollars in U. S. currency and a pension check for $30.00, making in all four hundred dollars; that this money was pinned together in packages of one hundred dollars each. I saw the defendant take these four packages of money of $100.00 each and put them in an envelope, and the defendant put this envelope in the jacket and addressed the jacket, sealed it up, and carried it in his hand to the window of the post-office (post-office being in one corner of said room), and delivered it to his father, the postmaster, and the defendant went to dinner; when he came back he brought out the mail pouch and asked where was the registered matter; his father said it was in the pouch; defendant said he did not want to send it in the pouch, but wanted to get a hand-to-hand receipt for it, and he (defendant) then took the mail pouch back into the post-office; can't say how long he remained in the office with the pouch. On cross-examination this witness stated: I saw defendant put in the jacket the envelope he had put the money in; I can't now swear to the identity of the package, but this one handed to me looks exactly like the one he enclosed the envelope he put the money in; the writing on this jacket, to wit, "Waco, Texas," is in the defendant's handwriting.

T. M. Wilson swore that when defendant came back from dinner he came out of the post-office, threw the mail pouch down, and said there were 400 dollars of Government money in it; he then picked up the pouch and walked off towards the depot with it; I saw him have nothing but the mail pouch; was in a few feet of him, and saw no registered package in his hand; a few days after this I heard of missing money from the post-office, the $400 which he, defendant, said was in the mail pouch.

G. W. Herod, witness for defendant, testified: I was met on the street on the morning of April 6, 1893, by defendant and requested to come over to the store (post-office was in the store) and assist him or count for him some surplus money-order funds he was going to send to Waco; when I got to the post-office Mr. Fullen and defendant had counted out the money and had it pinned up in four separate packages on the desk; I counted the money in two, I think three, of the packages and looked at all of the piles; there was $100.00 in each pile I counted; I saw no check in either of
22 the piles, all United States currency, mostly $10 and $20 bills; the defendant, in my presence, took up the four packages of money and put them together and placed them in a large envelope, sealed it up, and placed this letter in a large, red jacket; he also put in this same large jacket a letter addressed to Ed. Strauss, which he said had money in it, and sealed it up in the jacket and addressed

it (the jacket) to the postmaster at Waco. On cross-examination this witness stated: "Defendant put the two envelopes in the jacket, the one to Strauss and one to the postmaster at Waco; he held the jacket in his hand and walked to the post-office window, a few steps from the desk, and I saw him hand the package to his father, and then he went to dinner."

The witness Darwin testifies that he was at the post-office in Thornton for his mail, after dinner on April 6, 1893, and that when it was near the time for the arrival of the south-bound mail and passenger train that witness, defendant, and W. W. Sellers started together to go to the depot to meet the train; when we reached the depot the smoke of the train was in sight; on the way from the post-office to the depot defendant playfully struck me in the face with a large registered package or jacket and said it contained $400.00; that witness snatched the jacket playfully. I felt the package; it was a large package; the defendant had two other jackets in his hands when we got to the platform at the depot; we sat down (all three of us) on a truck, and in a few moments the mail train came in going south; we all got up from the truck, and witness went towards front of the train and the defendant went towards the postal car with the three packages in his hands to deliver them to the postal clerk; witness did not turn around to see if defendant handed the packages to the postal clerk on the train.

W. W. Sellars on this point testified: "I was at the hotel on the gallery, which is about 45 feet from the gallery of the post-office, at Thornton; saw defendant standing in front of the post-office; I went over where he was, and defendant stepped in the post-office and got 2 or 3 packeges, and then defendant, Darwin, and myself started to the depot; on reaching the depot we three sat down on a truck; the smoke of the train was then about one mile off; as the train was pulling up to the depot we all got up from the truck and the defendant took the three packages that he had in his hands and delivered them to the man on the mail car. I saw him
23 do it. One of the packages or jackets so delivered was the jacket Darwin had in his hand as we came to the depot to the postal clerk, on the train. It was larger and thicker than either of the other two defendant had. The defendant here introduced in evidence the registry-package receipt from the postal clerk on the train mailed back from Kosse to Thornton on the 6th April, 1893, acknowledging receipt of register jacket No. 6 from Thornton to Waco, and No. 3 from Oletha to Galveston. On this point the defendant testified that he made up the registry package No. 6, in which he placed the $400.00, surplus money-order funds, in the presence of J. W. Fullen and G. W. Herod, both of whom he asked to count the money; that he placed the registry package in which he inclosed the money and marked or numbered the package No. 6, sealed up the envelope and addressed it to the postmistress at Waco. He also testified that he inclosed $16.50 in another envelope addresses to Ed. Strauss, Waco, Texas, sealed it up and placed both of these registered packages in an United States post-office order department registered jacket package furnished by the Government.

It has printed on it "postmaster at," just opposite of which words I wrote Waco, & opposite the words "State of" I wrote "Texas," and opposite the printed "No." in left-hand side of said package I wrote the figure "6." I also on that day made up a package to be sent to Kosse, and had one en route from Oletha to Galveston. After making up package No. 6, as stated, I walked to the delivery window and handed it and the two other jackets to my father and then went to dinner. I did not know on April the 6th, 1893, exactly what the post-office at Thornton owed the United States. I knew it was as much as $100. I returned from dinner a short time before the south-bound mail train going south was due, which was due at 1.27 p. m. I asked my father (the postmaster) for the three registered packages and stated to him I wanted to get a hand-to-hand receipt from the postal clerk (which I had been directed before that to do when sending off registered packages) by Post-office Inspector Hamilton, and my father had put the packages in the mail pouch and locked it up. I think he unlocked the pouch and took out the three packages and handed them to me. I took them and started out and met Mr. Darwin on the porch, in front of the post-office, had a few words with him, and while we were talking W. W. Sellers came up and we three started to the depot. I carried the three packages in my hand. On the way to the depot I
24 playfully tapped Darwin in the face with jacket No. 6 for Waco, and he took it out of my hand and felt of it. I told him there were two registered packages in it, one for the postmaster at Waco, containing $400.00, and one to Ed. Strauss, containing $16.50. He handed the packages back to me and we went to the depot and sat down on the truck. The train was in sight and soon pulled up to the depot. We got up and I went directly to the postal car and delivered the packages to the postal clerk and presented him a registered-package hand-to-hand receipt to be signed by him for these three packages, No., respectively, 673: No. 6 for the postmaster at Waco, No. 7 for the postmaster at Kosse, and No. 3 for the postmaster at Galveston. The postal clerk refused to sign this hand-to-hand receipt and gave as his reason for not signing it that the first line (to wit, "R," under the word "description;" "6," under "No. of package;" "Thornton," under words "postmarked at 4–6," under the words "date of postmark," and "Waco," under name of "post-office address") were written in lead pencil instead of pen and ink, but said he would make out a receipt for the three packages himself and would mail it back to me at Kosse. This receipt I received from my father when the north-bound mail came and was opened about three or four o'clock p. m. that same day. (The defendant introduced this receipt sent up from Kosse by the railway postal clerk.) Defendant stated further that he made out the registry-receipt bill sent with the two registry packages in jacket No. 6; that he made a mistake in the date, putting the date 3–6, 1893, instead of 4–6, which was the correct date. This registry bill I made out myself and it reads as follows: "Registry bill 3–6, 1893, registered letters, etc., from Thornton to P. O. at Waco. In reg.

pkg. No. 6 all registered letters or parcels sent in this package with this bill must be described below."

Reg. No.	Class.	Addressed to—
6	"	P. M.
7		Ed. Strauss.

Sent by J. E. Foust, P. M.
Received by Helen A. Conger, P. M.

25 This is as it was when I placed it in the jacket at Thornton, and it is just as it was when my father handed it to me on the 7th day of April, 1893. Both registry No. 6 and reg. No. 7 were on it when I inclosed it and sent it, and were on it when it was first seen by me on its return to Thornton. The only addition or change in the registry bill was the addition of the signature of Helen A. Conger, postmistress at Waco, and the Waco stamp impressed on the side with the address.

I never embezzled a cent of post-office funds in my life, or any other funds belonging to the Government.

J. E. Foust, postmaster at Thornton, on this point testified that on the 6th day of April, 1893, he had on hand surplus money-order funds belonging to the Government to the amount of $400.00, and his son, defendant, said he would remit it to Waco. I did not keep the books. My son, the defendant, kept the money-order books. He went to the desk in the store where he does all of his writing, and I saw there with him Mr. Fuller and Mr. Herod. Just before dinner time he handed into the post-office registered package No. 6, directed to the postmaster at Waco. I put it in registered-matter drawer in the office. When defendant returned from dinner he asked me for the package and one other he had put up for Kosse and one *in transitu* to Galveston, and said he wanted to get a hand-to-hand receipt from the postal clerk on the train, and I handed him the three packages. This was a short time before the mail train going south was due to arrive. Defendant went out on the porch, and in a few moments I saw him, Darwin, and Sellers going to the depot. On the 7th day of April, 1893, when I opened the mail from Waco, I took out of the mail pouch the registry-receipt bill returned from Waco. I examined it carefully to see if the package containing the $400.00 had gone through all right, and found that the receipt had endorsed on it, No. 6, P. M., No. 7, Ed. Strauss. (Here said registry-bill receipt was shown witness) and he said it was in the same condition when he unlocked the pouch on the 7th April, 1893, and took this bill out as it is now.

My son, the defendant, does not carry the mail pouches from or

to the cars and did not carry them on the 6th day of April, 1893, to the depot. Shaw Sanders always carried the pouches from the post-office to the train, and brought them from the train to the post-office. Defendant never did.

26 Bill of exceptions No. 9.

The court failed to present to the jury the *faze* of the evidence which would have entitled them to acquit the defendant, for which presentation reference is here made to the full text of the charge of the court contained in bill of exceptions No. 5, there being testimony of the defendant tending to prove that he sent in jacket No. 6 two registry packages, registry package No. 6, containing the $400.00 to the P. M. at Waco, and registry package No. 7, containing the remittance to Ed. Strauss, at Waco; that he mailed same on the train at Thornton, and exhibited in evidence his hand-to-hand receipt received from postal clerk on train and also his registry-bill receipt returned from Waco, signed by the postmistress at Waco for said two registry packages inclosed in jacket No. 6; to which charge of the court and failure to present the theory of the defendant the defendant did then and there, in open court, except, and tendered this his bill of exceptions. The defendant asked no charge on this subject.

Bill of exceptions No. 10.

(Disallowed by the court.)

Bill of exceptions No. 11.

Be it remembered that on the trial of this cause the defendant requested the court to charge on circumstantial evidence and tendered in writing the following special charge:

In the United States District Court for the Northern District of Texas, at Waco.

THE UNITED STATES
vs. } # 305.
W. J. FOUST.

The defendant, by his counsel, prays the court to instruct the jury as follows:

The Government in this case relies solely upon circumstancial evidence for a conviction of the defendant, and you are instructed, in order to warrant a conviction of a crime on circumstancial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt.

All the facts (that is, facts necessary to the conclusion) must
27 be consistent with each other and with the main facts sought to be proved, and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty

that the accused, and no other person, committed the offense charged, and must exclude every reasonable hypothesis save the guilt of the defendant.

PEARRE & BOYNTON AND
GARDNER & ELLIS,
Attorneys for Defendant.

Refused.
JOHN B. RECTOR, *Judge.*

Which was refused by the court; to which ruling of the court the defendant then and there, in open court, did except and tendered this his bill of exception.

In explanation of this bill it should be stated that it was in proof on the trial that defendant, as assistant postmaster, had the sole management and control of the money-order business and money-order funds of the post-office at Thornton. By T. M. Wilson and J. W. Fullen it was proved that he had exclusive possession of the mail pouch containing the registered matter in controversy immediately before the time for mailing it. It was further in proof that the money-order funds of which defendant was in possession was short $744.18. This was proved by the auditor's statement, and under sec. 4046, R. S., made a *prima facia* case and was direct evidence.

Bill of exception No. 12.

Be it remembered that on the 20th day of April, 1895, the defendant filed the following motion to set aside the judgment rendered against him in the above numbered and entitled cause and to grant him a new trial:

In the United States District Court for the Northern District of Texas, at Waco, Texas, April Term, A. D. 1895.

UNITED STATES
vs.
W. J. FAUST. } No. 305.

And now comes the defendant in the above-styled cause and moves the court to set aside the judgment rendered herein and grant him a new trial for the following reasons, to wit:

1st. The court erred in its charge to the jury in that it failed to charge the law defining the offense of embezzlement as set forth in section 4046 of the Revised Statutes of the United States, the section under which both counts in the indictment were drawn.

2nd. The court erred in the fourth subdivision of his charge to the jury wherein he states: "It is clear, under the testimony, that the defendant was the assistant postmaster at Thornton, in Limestone county, Texas," because there was no evidence introduced on the trial of the cause to warrant such conclusion.

28 The Government proved that the defendant was the assistant postmaster at Thornton, but utterly failed to prove or

attempt to prove that Thornton was in Limestone county, or that Thornton was in the State of Texas, or that Thornton was in the northern district of Texas.

3rd. The court charged the law of embezzlement as follows: "If any officer, agent, clerk, or attorney at law or in fact shall fraudulently misapply or convert to his own use, without the consent of his principal or employer, any money or property of his principal which may have come into his possession or be under his care by virtue of such office, agency, or employment, he is guilty of embezzlement." Under this definition of embezzlement the want of the consent of the principal or employer is an essential element of the offense which must be alleged in the indictment and proved upon the trial. The indictment filed herein and upon which W. J. Foust was tried and convicted, in neither of the two counts therein contained is it alleged that the said W. J. Foust "did embezzle and convert to his own use the money described in the indictment without the consent of his principal and employer."

It seems clear from that portion of the charge contained in the fourth subdivision that the court informed the jury that the father of the defendant, the postmaster at Thornton, was the principal or employer of the defendant. Fourth subdivision of the charge reads as follows: 4th. It is clear under the testimony that the defendant was assistant postmaster at Thornton, in Limestone county, Texas, and that the $400.00 which he is charged with embezzling came into his hands by virtue of his office, and that he was intrusted by his father, the postmaster at Thornton, with the duty of sending it to the postmaster at Waco, Texas. It then become- incumbent upon the court to instruct the jury "that if you further believe that the said W. J. Faust did then & there fraudulently embezzle and convert the said $400.00 to his own use (the same being money-order funds) without the consent of his employer or principal, J. E. Faust, the postmaster at Thornton, you will find the defendant guilty under the 2nd count of the indictment," but no such instruction appears anywhere in the charge of the court, which we contend is error.

4th. The court erred in his charge in summing up the evidence in that he gave more and undue prominence to the testimony of Mrs. Wilber, the principal witness for the Government, than he did to the principal witnesses for the defendant, to wit, J. E. Foust,
29 J. W. Fuller, G. W. Herod, R. W. Darwin, W. W. Sellers, and the defendant.

In summing up the evidence of Mrs. Wilber, he states: "Mrs. Wilber, the register clerk in the post-office at Waco, on April the 6th, 1893, testified that she received a package or jacket No. 6 and found only one letter, which was addressed to Ed. Strauss and marked No. 7 on the registry bill; that no other envelope except the Strauss package came in jacket No. 6, and that the registry bill contained in said jacket had on it No. 7, to Ed. Strauss, and did not have on it No. 6, P. M., which now appears on said registry bill.

Witness says she kept the registry book and opened jacket No. 6.

The testimony of Mrs. Wilber, as summed up by the court in his charge, is a full statement of all she said material to the case. The court in his charge summed up J. E. Foust's testimony as follows: "J. E. Foust, the father of the defendant, testified that he examined the registry-bill receipt when it came back from Waco, and that it had on it then the entry No. 6, P. M., and the entry No. 7, Ed. Strauss." This summing up of J. E. Foust's testimony is not a full statement and certainly fails to give a correct idea to the jury as to the value of the witness's testimony. This witness testified in reference to the return registry-bill receipt that on the 7th of April, 1893, he was expecting the return of the registry-bill receipt for the $400.00 that his son had sent on the 6th, and when the mail arrived at the depot Shaw Saunders brought the pouch containing the Waco mail to the office. He, witness, was in the office and received the pouch, unlocked it, and got out the registry-bill receipt and examined it carefully and found that it was signed properly by Mrs. Conger, postmistress at Waco, and that it had on it then (when he took it from the pouch) the entry No. 6, P. M., and entry No. 7, Ed. Strauss; that defendant was not at the post-office when witness opened the pouch and took therefrom the registry-receipt bill. The court in his charge to the jury in summing up J. W. Fulier's and G. W. Herod's testimony simply says: "J. W. Fuller and G. W. Herod testified to counting the money and seeing the defendant put it up." Simply this and nothing more; and, referring to the testimony of R. W. Darwin and W. W. Sellers in his charge, says to the jury: "R. W. Darwin and W. W. Sellers testify to the accompanying the defendant to the depot, and that he had jacket No. 6, and Darwin testifies that he said there were $400.00 in jacket No. 6."

30 "The defendant testified (says the court in his summing up to the jury) that he put up the $400.00 and sent it to the postmaster at Waco, in jacket No. 6, and that the Ed. Strauss package was in same jacket No. 6. He says that when the registry bill came back from Waco, receipted by the postmistress, that there was on it No. 6, P. M., as well as No. 7, Ed. Strauss." The court failed to call the jury's attention to the important facts bearing on — case in summing up the testimony of the above witnesses for the defendant. The important facts testified to by J. W. Fuller were that he helped the defendant to count the money and saw the defendant enclose it in an envelope and seal it up, the said $370.00 in money and a check for $30.00, making $400.00. When we counted the money he put it in an envelope. Mr. Foust took the envelope and put it in the jacket and addressed the jacket and sealed it and carried it to the window and delivered it to his father, and defendant went to dinner. On cross-examination witness stated: "Saw him" (meaning by him the defendant) "put in the jacket the envelope with the money; can't swear to the jacket, but this is his (defendant's) handwriting." (See note book of judge, pages 210 and 211.) G. W. Herod testified as follows (see note book of judge, page 212): I counted two or three packages of the money, one hundred dollars in each package. He, defendant, put it (meaning the money) in a large envelope. He put the Strauss letter and the letter to P. M. in

a large envelope or jacket and sealed up the jacket and addressed it to the postmaster at Waco. He put two envelopes in the jacket, the one to Strauss, one to postmaster at Waco. He held it (meaning the jacket) in his hand. I saw him hand the package to his father. The vital point sought to be proven by the witnesses R. W. Darwin and W. W. Sellers was not "that they accompanied defendant to the depot, and that defendant had jacket No. 6," but the main fact sought to be proved, and proved by these two witnesses, was that defendant actually delivered jacket No. 6 into the hands of the postal clerk on the train, then just arrived at the depot. Now, on that point the witness Darwin swore that he started from the post-office at Thornton with defendant and accompanied him to the depot; that on the way defendant playfully tapped him on the face with jacket No. 6 and he, witness, took the jacket and examined it by feeling it and said it was a bulky package and asked defendant what was in it to make it so bulky, and defendant replied that there was $400.00 in — for the postmaster at
31 Waco and a letter containing money (he stating amount) for Ed. Strauss. Defendant had two other jackets in his hand. They went on together to the depot and sat down on a truck and in a few moments the mail train came in, going south. They got up and witness went towards the front of the train and the defendant went towards the postal car with the packages referred to in his hand, to deliver them to the postal clerk. Witness did not turn around to see if defendant delivered the packages to the postal clerk on the train. W. W. Sellers on this point testified: I was at the hotel, on the gallery, about 45 feet from the porch in front of the post-office in Thornton; saw R. W. Darwin and defendant on the porch at the post-office. I went over where they were and in a few moments defendant, Darwin, and myself started to the depot. (This witness relates the circumstances that occurred in going to the depot as Darwin did) and says: On reaching the depot we three sat down on a truck, the smoke of the train then being in sight. As the train was pulling up to the depot we all got up from the truck and the defendant took the three packages that he had in his hands, which he had brought from the post-office, and went directly to the postal clerk on the train, and I saw him hand these three packages or jackets into the hands of the postal clerk and saw the postal clerk receive them. I know that he delivered the package or jacket Darwin had in his hand as he came to the depot to the postal clerk on the train, and also the two others he had. I know this fact because I was looking at him and saw him deliver them. On this point the defendant swore or testified that he received the three packages from his father, the postmaster, when he came from dinner; that his recollection is that his father had placed them, while he had gone to dinner, in the pouch and locked up said mail pouch. At defendant's suggestion his father unlocked the pouch and handed him the three jackets—jacket No. 6, directed to the postmaster at Waco, which enclosed the two registered packages, one directed to Ed. St-auss at Waco, the other containing $400.00 in United States currency, directed to the postmaster at Waco. He

wanted to get a hand-to-hand receipt from the postal clerk. Defendant stated that Darwin, Sellers, and himself on the way from the post-office to the depot were walking together, he in the center and Darwin on one side and Sellers on the other; relates the circumstances as detailed by the other two witnesses, Darwin and Sellers, as to what occurred and was said as they went to —
32 depot, and further states that when the train arrived at the depot he walked directly to the postal car and delivered the three jackets, jacket No. 6 being one, to the postal clerk, and presented to the postal clerk a hand-to-hand receipt to be signed by him, which the postal clerk refused to sign because one of the entries on the receipt was made in lead pencil, the postal clerk stating that he would make out a hand-to-hand receipt for him when he got to Kosse and return it to him on the next train; that the next train arrived somewhere about three o'clock in the evening, and when the mail was opened by his father he was handed the hand-to-hand receipt sent from Kosse by the postal clerk. This hand-to-hand receipt was introduced in evidence by the defendant.

5th. The court erred in that portion of his charge in which he says: "On the sixth of April, 1893, the defendant made up a registered package and put it in jacket No. 6 and sent it to the postmaster at Waco. The package was duly received at said place, receipted for on the registered bill that accompanied said registered package by the postmaster at Waco. This registry bill also came in jacket No. 6." In this clause of the charge the court states to the jury, in effect, that the defendant put up but one registry package (one envelope) in jacket No. 6, when the proof is most clear and uncontradicted, by two disinterested witnesses, to wit, J. W. Fullen and G. W. Herod, that two registry packages were inclosed in said jacket No. 6. (See their testimony, recited elsewhere herein.)

6th. The verdict of the jury is not responsive to the charge of the court. In subdivision No. 5 of the charge the court uses this language: "5th. You will acquit the defendant under count No. (1) one of the indictment." The verdict rendered by the jury is as follows: "In the United States court for the northern district of Texas, at Waco. Verdict of the jury in case of The United States *vs.* W. J. Faust. We, the jury, find the defendant guilty as charged in the 2nd count of the indictment. W. C. Pool, foreman."

7th. The court erred in overruling defendant's plea to the misnomer in the indictment.

8th. The court erred in omitting to charge the law governing circumstantial evidence and in refusing the charge asked by the defendant on circumstantial evidence. (See charge No. 2 asked for by the defendant.)

33 9th. The court erred in refusing to give in charge to the jury defendant's first special charge on venue. (See first special charge.)

10th. The verdict of the jury is contrary to the law and the evidence and wholly unsupported by the evidence in the case.

11th. The charge of the court as a whole is calculated to mislead the jury and did mislead the jury.

PEARRE & BOYNTON,
GARDNER & ELLIS,
Att'ys for Defendant.

Endorsed as follows: No. 305. The United States *vs.* W. J. Faust. Motion for a new trial. Filed April 20th, 1895. J. H. Finks, clerk, by C. A. Richardson, deputy.

Which said motion was argued by counsel for defendant before the court on the 22nd day of April, 1895, and was by the court overruled; to which ruling of the court the defendant then and there, in open court, did except and tendered this his bill of exception and then and there, in open court, gave notice of appeal to the Supreme Court of the United States.

THE UNITED STATES
vs.
W. J. FAUST. } # 305.

The above and foregoing exceptions of the defendant are approved, with the exception of Nos. 4, 7, and ten, which are refused. The clerk in entering exceptions will incorporate the addenda by the dist. att'y to Nos. 1, 2, 3, 8, 11.

JOHN B. RECTOR,
U. S. Dist. Judge.

Endorsed: No. 305. The United States *vs.* W. J. Faust. Bills if exception. Filed May 4th, 1895. J. H. Finks, clerk, by C. A. Richardson, deputy.

Dismissal as to First Count of the Indictment.

THE UNITED STATES
vs.
W. J. FAUST. } # 305. Charge: Embezzlement of Money-order Funds.

APRIL 19TH, 1895.

On this day, on motion of the district attorney, it is ordered by the court that this case be, and it is hereby, dismissed as to the first count in the indictment herein.

34 *Petition for Writ of Error.*

In the District Court of the United States for the Northern District of Texas, at Waco.

THE UNITED STATES
vs.
W. J. FAUST. } # 305.

To Honorable John B. Rector, judge of said court:

Your petitioner, W. J. Foust, a resident citizen of Thornton, in Limestone county, Texas, in said northern district, complaining of

the United States of America, of whom the Honorable W. O. Hamilton *as* district attorney and attorney of record, a resident of the county of Comanche, in said northern district, temporarily residing in the city of Waco and McLennan county, in the said northern district, in attendance upon the present term of said court, with respect represents that heretofore he was indicted by the grand jury empannelled by the said court of having embezzled ($744.18) seven hundred and forty-four dollars and eighteen cents, as charged in the first count of the indictment, and having embezzled ($400.00) four hundred dollars, as charged in the second count of the indictment, he being charged in each and both counts as then and there being the assistant postmaster at Thornton, Limestone county, Texas, and upon said indictment, at the present term of said court, was tried and convicted of the offence charged in the second count of the indictment on file in this cause and by the court sentenced to pay a fine of four hundred dollars and to imprisonment to hard labor in the penitentiary for the term of five years.

From which judgment and conviction and sentence your peti-oner desires a writ of error to review the judgment, and, if there be error, for reversal thereof; that he here now tenders, together with his petition, his assignment of errors and form of writ and citation, together with his prayer for bail and supersedeas, and with
35 respect prays that a writ of error may be allowed, and that he be granted his citation by the United States, to be served upon the hon. district attorney, and that he be discharged upon bail, and that writ of error shall act as a supersedeas.

PIERRE & BOYNTON AND
GARDNER & ELLIS,
Attorney- for Petitioner, W. J. Foust.

Endorsed: No. 305. The United States *vs.* W. J. Foust. Petition for writ of error. Filed May 2, 1895. J. H. Finks, clerk, by C. A. Richardson, deputy.

36 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the northern district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you or some of you, between The United States of America and W. J. Faust, a manifest error hath happened, to the great damage of the said W. J. Faust, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington in thirty days from the date hereof, in the

said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the U. S. District Court, Northern Dist. Texas, Waco.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 2nd day of May, in the year of our Lord one thousand eight hundred and ninety-five.

J. H. FINKS,
Clerk of the District Court of the United States,
By C. A. RICHARDSON, *Deputy.*

Allowed by—

JOHN B. RECTOR,
U. S. Dist. Judge.

[Endorsed:] No. 305. The United States *vs.* W. J. Faust. Original writ of error. Filed May 2, 1895. J. H. Finks, clerk, by C. A. Richardson, deputy.

37 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the United States of America, of whom W. O. Hamilton, Esq., is United States district attorney for the northern district of Texas and attorney of record in this cause, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the northern district of Texas, at Waco, Texas, wherein W. J. Foust is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States Supreme Court, this 2nd of May, in the year of our Lord one thousand eight hundred and ninety-five.

JOHN B. RECTOR,
Judge of the United States District Court
for the Northern District of Texas.

Test, with seal of said district court, at Waco, Texas, this 2nd day of May, 1895.

[Seal of the U. S. Circuit Court, Northern Dist. Texas, Waco.]

J. H. FINKS, *Clerk,*
By C. A. RICHARDSON, *Deputy.*

38 I, W. O. Hamilton, United States district attorney for the northern district of Texas, hereby, on this the 2nd day of May, 1895, accept service of the foregoing citation in error and wa-ve copy of said citation.

W. O. HAMILTON,
United States District Attorney for the Northern District of Texas and Attorney of Record in this Case.

[Endorsed:] No. 305. The United States *vs.* W. J. Faust. Citation in *writ of* error. Filed May 2, 1895. J. H. Finks, clerk, by C. A. Richardson, deputy.

39 *Application for Supersedeas and Bail.*

In the District Court for the Northern District of Texas, at Waco, Texas.

THE UNITED STATES *vs.* W. J. FAUST. } # 305.

Now comes the defendant, W. J. Foust, and represents that he has been sentenced to pay a fine of $400.00 and imprisonment to hard labor in the penitentiary for the term of five years; from which judgment and sentence he has applied for writ of error to the Supreme Court of the United States, and with respect here now applies for supersedeas and bail upon complying with such terms as may be required by the court and such conditions as have been prescribed by law and the rules of the court.

PEAREE & BOYNTON &
GARDNER & ELLIS,
Attorneys for the Defendant, W. J. Foust.

Endorsed: No. 305. The United States *vs.* W. J. Faust. Application for supersedeas and bail. Filed May 2nd, 1895. J. H. Finks, clerk, by C. A. Richardson, deputy.

Order Granting Bail and Supersedeas.

THE UNITED STATES *vs.* W. J. FAUST. } # 305.

MAY 4TH, 1895.

It is hereby ordered by the court that the order made and entered in this case on the 2nd day of May, 1895, fixing the bail of the defendant be, and the same is hereby, set aside and held for naught; and it is now here ordered by the court that the writ of error prayed for by the defendant be granted, and, it further appearing to the court that all conditions of law and rules of court appertaining to the review of this case by the Supreme Court of the United States on writ of error have been complied with, it is ordered by

the court that the defendant, W. J. Faust, be admitted to bail in the sum of $3,000.00, with two good and sufficient sureties, to be approved by the clerk of this court, conditioned that the said W. J. Faust shall appear before the Supreme Court of the United States, at the city of Washington, D. C., at the next regular term thereof, and there remain from day to day and from term to term until discharged by said court, and that he abide by the decision of said court; and it is further ordered that the execution and approval of said bond shall operate as a supersedeas to the judgment for fine and costs and imprisonment herein rendered against the defendant, W. J. Faust, pending the writ of error granted herein.

JOHN B. RECTOR,
U. S. District Judge.

Endorsed: 305. United States *vs.* W. J. Faust. Order granting bail and supersedeas. Filed May 4, 1895. J. H. Finks, by C. A. Richardson, deputy.

Clerk's Certificate.

I, J. H. Finks, clerk of the district court of the United States for the northern district of Texas, at Waco, do hereby certify that the foregoing 40 pages contain a full and true transcript of the record and proceedings had as they appear of record and on file in said court in case # 305, entitled The United States, plaintiff, *vs.* W. J. Faust, defendant.

The Seal of the U. S. District Court, Northern Dist. Texas, Waco.

In witness whereof I hereunto set my hand and affix the seal of said district court, at office, in the city of Waco, on this the 17th day of May, A. D. 1895.

J. H. FINKS,
Clerk of said Court,
By C. A. RICHARDSON, *Deputy.*

Endorsed on cover: Case No. 15,926. N. Texas D. C. U. S. Term No., 637. W. J. Faust, plaintiff in error, *vs.* The United States. Filed June 1, 1895.

FILED
OCT 24 1895
JAMES H. McKENNEY,
CLERK.

No. 637.

ERROR TO THE

United States Supreme Court

AT WASHINGTON, D. C.

W. J. FAUST, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT WACO.

MOTION OF PLAINTIFF IN ERROR TO ADVANCE THE CAUSE

PEARRE & BOYNTON,
Attorneys for Plaintiff in Error.
RICHARD H. HARRISON,
Also for the Motion.

Press of ROSS BATTLE, Waco.

No. 637.

ERROR TO THE

United States Supreme Court

AT WASHINGTON, D. C.

W. J. FAUST, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AT WACO.

MOTION TO ADVANCE THE CASE.

STATEMENT OF THE MATTER INVOLVED.

The plaintiff in error, under the name of W. J. Faust, was indicted by the United States grand jury for the Northern District of Texas, holding session in Waco, McLennan county, Texas, on the 21st day of December, 1893. First count in the indictment charged plaintiff in error with embezzling and appropriating to his own use $744.18 of the money order funds of the United States; and the second count charged him with the embezzlement and conversion to his own use of $400 of the money order funds of the United States.

On the 16th day of April, 1895, a jury was empan-

neled and this cause proceeded to trial before a jury. The jury, on the 18th day of April, 1895, returned a verdict of guilty, as charged in the second count of the indictment, and on May 1, 1895, plaintiff in error was sentenced by the Court to pay a fine of $400 and to imprisonment for five years at hard labor in the penitentiary at Columbus, Ohio. When the case was called for trial plaintiff in error filed his plea of misnomer and motion to quash, because the indictment charged W. J. Faust, when in fact the defendant's name was W. J. Foust, and he had never been know or called by the name of Faust, which motion was overruled by the Court, and defendant reserved his bill of exception and assigned the ruling as error.

Plaintiff in error complains of the ruling of the Court in admitting in evidence, over defendant's objection, a certain certified transcript from the money order account books of the postoffice department of the account of J. E. Foust, postmaster at Thornton, for the reason that said transcript did not purport to be a transcript of the account of W. J. Foust, and could not tend to prove any issue in the suit against him. Plaintiff in error reserved bill of exception and assigns the same as error.

Third assignment of error is based upon refusal of the Court to permit plaintiff in error to prove on the trial by J. E. Foust and Mrs. Conger, postmistress at Waco, that on the 26th day of September, 1892, he, J. E. Foust, postmaster at Thornton, forwarded to the postmaster at Waco $200 surplus money order funds and that said package was stolen in transitu.

He also offered to prove that one, King Crain, (now in the penitentiary), was the postal clerk on the mail train running from Bremond to Albany, Texas, and that this registry package would have to go from Bremond to Waco on this route, and that King Crain embezzled said package, money remittance sheet and return registry bill receipt. He further offered to prove that King

Crain was indicted for embezzling in four indictments, and was convicted on three of said indictments on April 19, 1893; also offered in evidence the judgments of conviction and sentence. The Court, on objection of the district attorney, refused to admit the evidence. Defendant excepted, and assigns the ruling as error.

In the plantiff in error's eight assignment of error he complains of that portion of the charge, which is as follows: "Did the defendant send off to the postoffice at Waco, in jacket No. 6, registered letter No. 6 containing $400, or did he send only registered letter No 7 for Ed Strauss, in said jacket No. 6, and embezzle the $400?

This is the vital question in the case, and upon it turns the guilt or innocence of the defendant." Immediately following the above, the Court proceeds to decide for the jury the issue submitted. He proceeds: "*On the 6th* day of April, 1893, the defendant made up a registry package, and put *it* in jacket No. 6, and sent it to the postmaster at Waco. The package was duly received at said place, receipted for on the registry bill that accompanied said registered package by the postmistress at Waco. This registry bill also came in jacket No. 6. Mrs. Wilbur, the registry clerk in the postoffice at Waco, on April 6, 1893, testified that she received the package or jacket No. 6, and found only one letter which was addressed to Ed Strauss, and marked No. 7 on the registry bill; that no other envelope, except the Strauss package, came in jacket No. 6, and that the registry bill contained in said jacket had on it No. 7, to Ed Strauss, and did not have on it No. 6, P. M., which now appears upon said registry bill. Witness says she kept the registry book and opened jacket No. 6."

We contend that this portion of the charge not only decided for the jury what the facts in evidence were, but also decided for the jury the application they were to make of the facts. The defendant proved by two witnesses, Herod and Fullen, that they counted the $400 for defendant and saw him enclose it in an envelope, ad-

dress the envelope to the postmaster at Waco, and also saw him place money in another envelope and address it to Ed Strauss, Waco, and saw defendant take both of these packages and enclose them in a large registry jacket, seal it up, and address it to the postmaster at Waco, and hand it to the postmaster in the postoffice at Thornton; and then defendant went to dinner.

The defendant also proved, by Sellers and Darwin, that he handed this registry jacket to the postal clerk on the train at the depot at Thornton.

Defendant also introduced in evidence the registry receipt bill for this identical package No. 6, which was sent to him from Kosse by said postal clerk on the evening train.

He also introduced in evidence the registry receipt bill for package No. 6, P. M., and package No. 7, Ed Strauss, from the postmaster at Waco, to which portion of the charge of the Court, plaintiff in error excepted, and assigns same as error.

The Court failed to charge on the presumption of innocence. The defendant asked and prepared and presented, a charge on circumstantial evidence, (special charge No. 2), which reads as follows: "The government in this case relies solely upon circumstantial evidence for a conviction of the defendant, and you are instructed, in order to warrant a conviction of a crime on circumstantial evidence, each fact to the necessary conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts, (that is facts necessary to the conclusion), must be consistent with each other, and with the main facts sought to be proved, and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offence charged, and must exclude every reasonable hypothesis, save the guilt of the defendant."

The Court refused to give said charge to the jury, to which action of the Court the defendant reserved his bill of exception and assigns it as error, in the eleventh assignment of error.

Defendant filed his motion for a new trial on the 20th day of April, 1895, and on the overruling of same defendant excepted and gave notice of filing application for writ of error. There are other assignments of error, which for the purposes of this motion, need not be referred to herein.

The plaintiff in error would most respectfully submit as his reasons for this application to advance his case the following:

1. He was granted *supersedeas* and bail in the sum of $5000, but, owing to his extreme poverty, he was and is unable to give bail, and has been confined in the county jail of McLennan county, Texas, since the 16th day of April, 1895, and will have to remain confined in said jail until his writ of error shall be disposed of.

2. Because close confinement in jail is impairing his health and undermining his constitution.

For these reasons he prays the Court to advance his case and hear the same at as early a day of the present term as the Honorable Court may deem meet, proper and convenient, and so will ever pray.

PEARRE & BOYNTON,
Attorneys for the Motion.
RICHARD H. HARRISON,
Also for the Motion.

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Office Supreme Court, U. S.
FILED.
OCT 24 1895
JAMES H. McKENNEY,
CLERK.

ERROR TO THE

United States Supreme Court

AT WASHINGTON, D. C.

W. J. FAUST, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

APPEAL FROM THE NORTHERN DISTRICT OF TEXAS, AT WACO.

BRIEF OF PLAINTIFF IN ERROR.

PEARRE & BOYNTON, Attorneys for W. J. Faust, Plaintiff in Error, with RICHARD H. HARRISON Also on the Brief.

A H Garland
R B Garland for Plaintiff in Error

Press of ROSS BATTLE, Waco.

IN THE

United States Supreme Court

AT WASHINGTON, D. C.

W. J. FAUST, PLAINTIFF IN ERROR.

vs.

THE UNITED STATES, DEFENDANT IN ERROR.

APPEAL FROM THE NORTHERN DISTRICT OF TEXAS, AT WACO.

PEARRE & BOYNTON, Attorneys for W. J. Foust, Plaintiff in Error, with RICHARD H. HARRISON Also on the Brief.

STATEMENT OF THE NATURE AND RESULT OF THE SUIT.

The plaintiff in error in this case, under the name of W. J. Faust, was, on the 21st day of December, 1893, indicted by the grand jury for the Northern District of Texas, holding session in Waco, McLennan county, Texas, which indictment contained two counts. First count charges W. J. Faust with being assistant postmaster at Thorton, Texas, and that, as such officer, he embezzled and appropriated to his own use $744.18, money order funds of the United States; and the second count charges him with the embezzlement and conver-

of J. E. Foust, postmaster at Thornton, in the State of Texas, to the introduction of which testimony the defendant then and there excepted, for the reason that said transcript did not purport to be a transcript from the money order account books of the postoffice department of the account of W. J. Foust and could not tend to prove any issue in the suit against him, W. J. Foust.

The following was added to bill No. 2 by the district attorney: "It was proved on the trial that the defendant was the son of J. E. Foust; was assistant postmaster during the entire term of said J. E. Foust, and as such had the sole management, control and possession of the money order business and money order funds during said entire term." R.

Third Assignment of Error.

The Court erred in refusing to permit the defendant to prove by J. E. Foust, postmaster at Thornton, that on the 29th day of September, 1892, he forwarded to the postmaster at Waco, Texas, in proper form the sum of $170 in United States currency and $30 in a pension certificate, or check, making in all the sum of $200, the same being surplus money order funds, and that said package was stolen in transitu; and by Mrs. Helen Conger, postmistress at Waco in 1892, defendant offered to prove that the said remittance never reached Waco; that defendant offered to prove by J. W. Fullen that he counted said money and check, or pension certificate, and saw it deposited in jacket and placed in the postoffice at Thornton; that prior and subsequent to the day that said money order funds were placed in the mail to be conveyed to the postmaster at Waco by the postmaster at Thornton, one, King Crain, (now in the penitentiary), was the postal clerk on the mail train running from Bremond to Albany, Texas. This registered package would have to go from Bremond to Waco on this route, and that said registry package containing

said remittance, together with the $200 and the remittance sheet and return registry bill receipt, were embezzled by said King Crain, postal clerk as aforesaid.

And defendant offered in evidence four indictments against said King Crain, to-wit: Nos. 297, 298, 299 and 300, charging him, in the United States District Court at Waco, with the embezzlement of as many registered packages, containing money, in September, 1892, and proposed to offer in evidence the judgment of conviction in cases Nos. 297, 298 and 299, consolidated on trial, and the sentence of the Court, to the introduction of all of which evidence the counsel for the government objected, and the Court sustained the objection and refused to admit the evidence.

This testimony was material, for the reason that the purported transcript from the money order account books of the department failed to credit the account of J. E. Foust, postmaster at Thornton, with this $200 remittance, which rendered this evidence admissible, notwithstanding the fact that the Court restricted the finding of the jury to the $400 sent on the 6th day of April, 1893. All the testimony in reference to the shortage on the postoffice money order funds were admitted by the Court, and he stated in his charge, "All the testimony admitted, whether mentioned by the Court or not, is before you for your consideration."

The following was added to bill No. 3 by the district attorney: "The government objected to the offered evidence alluded to in this bill, on the ground that it tended only to prove that another person, other than the defendant in this case, at a time long anterior to the time of the commission of the offense as charged herein had committed another and different offense to the one herein charged, and the said other person had been indicted before the offense herein charged was committed and was convicted on April 19, 1893, and the evidence was, therefore, held to be irrelevant and immaterial." R.

First Proposition Under Third Assignment of Error.

This being a case solely of circumstantial evidence, the mind seeks to explore every possible source from which any light, however feeble, may be derived, and it is peculiarly proper that the jury should have before them every fact and circumstance, however slight, which may aid them in reaching a satisfactory conclusion. Greater latitude in such cases is necessarily allowed.

AUTHORITIES.

Shoultz v. The State, 13 Tex., 401.
Cooper v. The State, 19 Tex., 449.
Landers v. The State, 35 Tex., 359.
Ballew v. The State, 36 Tex.,98.
Barnes v. The State, 14 Tex., 342.
Noffsenger v. The State, 7 Tex. App., 301.
Preston v. The State, 8 Tex. App., 53.
Bouldin v. The State, Id. 332.
Washington v. The State, Id. 377.
Somerville v. The State, 6 Tex. App., 433.

Fifth Assignment of Error—

Was made solely to get before the Supreme Court of the United States the entire charge of the Court below, and being sufficiently covered by the other assignments, is not copied in this brief.

Eighth Assignment of Error.

The Court erred in that portion of his charge, which reads as follows: "Did the defendant send off to the postoffice at Waco, in jacket No. 6, registered letter No. 6, containing $400, or did he send only registered letter No. 7 for Ed Strauss, in said jacket No. 6, and embezzle the $400.00?" This is the vital question in this case,

and upon it turns the guilt or innocence of the defendant. "On the 6th day of April, 1893, the defendant made up a registry package and put it in jacket No. 6 and sent it to the postmaster at Waco. The package was duly received at the said place, receipted for on the registry bill that accompanied said registered package by the postmistress at Waco. This registry bill also came in jacket No. 6."

In this charge the Court decides for the jury the only issue in the case, and by so deciding the Court, in effect, states to the jury that Mrs. Wilbur's testimony is the only testimony in the case for them to consider. In other words, the charge is equivalent to directing the jury to find the defendant guilty. See bill of exception No. 8. (R., p.).

First Proposition Under the Eighth Assignment of Error.

Where the evidence merely tends to prove certain disputed facts in issue, it is error for the Court to assume in its charge that they had been proved, and thus withdraw from the jury the right to weigh the evidence bearing upon such facts.

Statement Under the First Proposition of the Eighth Assignment of Error.

The judge, in his charge, instructs the jury that "Mrs. Wilber, the registry clerk in the postoffice at Waco, on April 6, 1893, testifies that she received the package, or jacket No. 6, and found only one letter, which was addressed to Ed Strauss, and marked No. 7 on the registry bill; that no other envelope except the Strauss package came in jacket No. 6; and that the registry bill contained in said jacket had on it, "No 7, to Ed Strauss," and did not have on it "No. 6, P. M.," which now appears on said registry bill. Witness says she "kept the registry book, and opened jacket No. 6."

In summing up the testimony introduced by the

defendant on the trial of this cause, on this vital and only issue submitted, the Court says: "J. E. Foust, the father of the defendant, testified that he examined the registry bill receipt when it came back from Waco, and that it had on it then the entry of No. 6 P. M., and the entry of No. 7, Ed Strauss. W. J. Fullen and G. W. Herod testify to counting the money and seeing the defendant put it up, and R. W. Darwin and W. W. Sellers testify to accompanying the defendant to the depot, and that he had jacket No. 6; and Darwin testifies that he said there were $400 in jacket No. 6. The defendant testified that he put up the $400 and sent it to the postmaster at Waco in jacket No. 6, and that the Ed Strauss package was in the same jacket No. 6. He says that when the registry bill came back from Waco, receipted by the postmistress there, there was on it "No. 6, P., M." as well as "No. 7, Ed Strauss."

In this summing up of the testimony for the defendant, the Court failed to call the jury's attention to the important facts bearing on the issue. J. W. Fullen, witness for defendant, testified that he was called upon by the defendant on the morning of April 6, 1893, to count surplus postoffice money order funds, to be remitted to the postmaster at Waco; that he counted for the defendant $370, in United States currency, and a pension-check for $30, making in all $400; that this money was pinned together in packages of $100, each. "I saw the defendant take these four packages of money of $100 each and put them in an envelope and seal the envelope up, and the defendant put this envelope in the jacket, and addressed the jacket, sealed it up and carried it to the window of the postoffice, (postoffice being in one corner of said room), and delivered it to his father, the postmaster, and the defendant went to dinner."

"When he came back he brought out the mail pouch and asked where was the registered matter? His father said that it was in the pouch. Defendant said he

did not want to send it in the pouch, but wanted to get a hand to hand receipt for it, and he (defendant) then took the mail pouch back into the postoffice. Can't say how long he remained in the office with the pouch." R.

On cross examination this witness stated: "I saw defendant put in the jacket the envelope he had put the money in; I can not swear to the identity of the package (meaning jacket No. 6); but this one handed to me looks exactly like the one he enclosed in the envelope he put the money in—the writing on this jacket, to-wit: 'Waco, Texas,' is the defendant's hand-writing."

"T. M. Wilson swore that when defendant came back from dinner he come out of the postoffice, threw the mail pouch down and said there were $400 of government money in it. He then picked up the pouch and walked off towards the depot with it. I saw him have nothing but the mail pouch. Was in a few feet of him and saw no registered package in his hand. A few days after this I heard of missing money from the postoffice; the $400 which the defendant said was in the mail pouch." R.

G. W. Herod testified: "I was met on the streets on the morning of April 6, 1893 by defendant and requested to come over to the store, (postoffice was in the store), and assist or count for him some surplus money order funds he was going to send to Waco. When I got to the postoffice Mr. Fullen and defendant had counted out the money and had it pinned up in four separate packages on the desk. I counted the money in two, I think three, of the packages and looked at all the piles. There was $100 in each pile I counted. I saw no check in either of the piles; all United States currency, mostly $10 and $20 bills. The defendant, in my presence, took up the four packages of money and put them together and placed them in a large envelope, sealed it up and placed this letter in a large red jacket. He also put in this same large jacket a letter addressed to Ed Strauss, which he said had money in it, and sealed it up in the

jacket and addressed it (the jacket) to the postmaster at Waco.

On cross examination this witness stated: "Defendant put the two envelopes in the jacket, the one to Ed Strauss and one to the postmaster at Waco; he held the jacket in his hand and walked to the postoffice window a few steps from the desk, and I saw him hand the package to his father and then went to dinner." Counsel for the defendant contends that the vital point sought to be proved by the witnesses, R. W. Darwin and W. W. Sellers, was not that they accompanied the defendant to the depot, and that he had jacket No. 6, but the main fact sought to be proved by these two witnesses was that defendant actually did deliver jacket No. 6 into the hands of the postal clerk on the train, then just arrived at the depot.

The witness Darwin testified that he was at the postoffice at Thornton, for his mail, after dinner on April 6, 1893, and that when it was near the time for the arrival of the south-bound mail and passenger train, that witness, defendant and W. W. Sellers, started together to go to the depot to meet the train. When we reached the depot the smoke of the train was in sight; on the way from the postoffice to the depot defendant playfully struck me in the face with a large registry package or jacket; that witness snatched the jacket playfully. I felt the package; it was a large package. Defendant had two other jackets in his hands. When we got to the platform, at the depot, we sat down (all three of us) on a truck and in a few moments the mail train came in going south. We all got up from the truck, and witness went toward the front of the train, and defendant went towards the postal car with the three packages in his hand to deliver them to the postal clerk. Witness did not turn around to see if defendant handed the packages to the postal clerk on the train." (R., p.).

W. W. Sellers, on this point, testified: "I was at the hotel on the gallery, which is about 45 feet from

the gallery of the postoffice at Thornton, defendant standing in front of the postoffice. I went over where he was, and defendant stepped in the postoffice and got two or three packages, and then defendant, Darwin and myself started to the depot. On reaching the depot we three sat down on a truck. We saw the smoke of the train. It was then about one mile off. As the train was pulling up to the depot we all got up from the truck, and the defendant took the three packages that he had in his hands and delivered them to the man on the mail car. I saw him do it. One of the packages or jackets so delivered was the jacket Darwin had in his hand as we came to the depot, and this package was one of the packages I saw defendant hand to the postal clerk on the train. It was larger and thicker than either of the other two defendant had.

The defendant further introduced in evidence the registry package receipt from the postal clerk on the train, mailed back from Kosse to Thornton on April 6, 1893, acknowledging receipt of registry package No. 6, from Thornton to Waco, and No. 3 from Oletha to Galveston. On this point the defendant testified that he "made up the registry package No. 6, in which he placed the $400 surplus money order funds in the presence of J. W. Fullen and G. W. Herod, both of whom he asked to count the money; that he placed the registry package in which he enclosed the money and marked or numbered the package No. 6, sealed up the envelope and addressed it to the postmistress at Waco. I enclosed $16.50 in another envelope, addressed to Ed Strauss, Waco, Texas, sealed it up and placed both of these registry packages in an United States post-order department registry package jacket, furnished by the government. It (the jacket) had printed on it, "Postmaster at ————," just opposite of which words I wrote "Waco," and opposite the words "State of" I wrote "Texas," and opposite the printed "No." in left hand side of package

I wrote the figure "6." I also, on that day, made up a package to be sent to Kosse, and had one en route from Oletha to Galveston. After making up package No. 6, as stated, I walked to the delivery window and handed it and the two other jackets to my father, and then went to dinner. I did not know on April 6, 1893, exactly what the postoffice at Thornton owed the United States. I knew it was as much as $400. I returned from dinner a short time before the mail train going south was due, which was due at 1:27 p. m. I asked my father (the postmaster) for the three registry packages, and stated to him I wanted to get a hand to hand receipt from the postal clerk, (which I had been directed before that to do when sending off registered packages by Postoffice Inspector Hamilton). My father had put the packages in the mail pouch, and locked it up, I think. He unlocked the pouch and took out the three packages and handed them to me. I took them and started out and met Mr. Darwin on the porch in front of the postoffice, had a few words with him, and while we were talking W. W. Sellers came up, and we three started to the depot. I carried the three packages in my hand. On the way to the depot I playfully tapped Darwin in the face with jacket No. 6, for Waco, and he took it out of my hand and felt of it. I told him there were two registry packages in it—one for the postmoster at Waco containing $400, and one to Ed Strauss containing $16.50. He handed the package back to me, and we went to the depot and sat down on the truck. The train was in sight and soon pulled up to the depot. We got up and I went directly to the postal car and delivered the packages to the postal clerk and presented him a registry package receipt, to be signed by him for all three packages, numbered respectively, 6, 7, and 3. No 6 for the postmaster at Waco; No. 7 for the postmaster at Kosse; No. 3 for the postmaster at Galveston. The postal clerk refused to sign this hand to hand receipt, and gave as his reasons for not signing it, that the first

line, to-wit: "R" under the word "description," "6" under "No. of package," "Thornton" under the words "postmarked at 4—6," under the words "date of post mark," and "Waco" under the name of "postoffice address," were written in lead pencil instead of ink, but said he would make out a receipt for the three packages himself and would mail it back to me from Kosse. This receipt I received from my father when the north-bound mail train came, and was opened about 3 or 4 o'clock that same day. (The defendant introduced in evidence this receipt sent up from Kosse by the railway postal clerk). Defendant stated further that he made out the registry receipt bill sent with the two registry packages in jacket No. 6; that he made a mistake in the date, putting the date 3–6, 1893, instead of 4–6, which was the correct date.

This registry bill I made out myself, and it reads as follows: "Registry bill, 3–6, 1893, registered letters, etc., from Thornton to P. O. at Waco. ..... in Reg. P'k'g No. 6. All registered letters or parcels sent in this package, with this bill, must be described below. (The following is said registry bill receipt):

REG. NO.	CLASS	ADDRESSED TO
6	"	P. M.
7		Ed. Strauss

Sent by J. E. FOUST, P. M.
Received by HELEN A. CONGER, P. M."

This is as it was when I placed it in the jacket at Thornton, and it is just as it was when my father handed it to me on the 7th day of April, 1893, both registry No. 6, and registry No. 7 were on it when I enclosed

it, and sent it, and were on it when it was first seen by me, on its return to Thornton. The only addition or change in the registry bill was the addition of the signature of Helen A. Conger, postmistress at Waco, and the Waco stamp impressed on the side with the address. I never embezzled a cent of postoffice money order funds in my life, or any other funds belonging to the government."

J. E. Foust, postmaster at Thornton, on this point testified that "on the 6th day of April, 1893, he had on hand surplus money order funds belonging to the government to the amount of $400, and his son, defendant, said he would remit it to Waco; I did not keep the books. My son, the defendant, kept the money order books. He went to the desk in the store where he does all of his writing; I saw there with him Mr. Fallen and Herod; just before dinner time he handed into the postoffice registered package No. 6, directed to the postmaster at Waco; I put it in registered matter drawer in the office; when defendant returned from dinner he asked me for the package, and one other he had put up for Kosse, and one in transitu to Galveston, and said he wanted to get a hand to hand receipt from the postal clerk on the train, and I handed him the three packages. This was a short time before the mail train going south was due to arrive. Defendant went out on the porch, and in a few moments I saw him, Darwin and Sellers going to the depot. On the 7th day of April, 1893, when I opened the mail from Waco, I took out of the mail pouch the registry receipt bill returned from Waco. I examined it carefully to see if the packages containing the $400 had gone through all right, and found that the receipt had indorsed on it No. 6 P. M. and No. 7 Ed Strauss (here said registry bill receipt was shown witness), and he said it was in the same condition when he unlocked the pouch on the 7th day of April, 1893, and took this bill out, as it is now. My son, the defendant, does not carry the mail pouches from or to the cars, and

did not carry them on the 6th day of April, 1893, to the depot. Shaw Saunders always carried the pouches from the postoffice to the train, and brought them from the train to the postoffice; defendant never did."

AUTHORITIES.

Sharp & Hansen v. U. S., 156 U. S., 51.
Ætna Life Ins. Co. v. Ward, 140 U. S., 76-89.
Hicks v. U. S., 150 U. S., 451.

It is error to withdraw from the jury the determination of a disputed fact in issue.

Manchester v. Erricsson, 105 U. S., 347.
Insurance Co. v. Foley, 105 U. S., 353.
Burdell et al. v. Denig et al., 92 U. S., 116.

While it is correct practice for the judge in an absolute form, on an admitted state of the case, he is not authorized to take from the jury the right of weighing the evidence bearing on controverted facts.

Mutual Life Ins. Co. v. Snyder, 93 U. S., 393-4-5.

The instruction given by the Court overlooked the line which separates two separate spheres of duty. Though corelative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact, as of the Court to decide questions of law. The jury should take the law, as laid down by the Court, and give it full effect. But its application to the facts and *the facts themselves*, it is for them (the jury) to determine.

These are checks and balances which give to the trial by jury its value. They are indispensible to the harmony and proper efficacy of the system. Such is the law. Hickman v. Jones, 9 Wall, 197. And cases cited in Note at bottom of page 202.

Where there is any discrepancy, however slight, the Court must submit the matter to which it relates to the

jury, because it is their province to weigh and balance the testimony, and not the Court's.

Barney v. Schneider, 9 Wall U. S., 248-253.

Richmond & Danville R. R. v. Powers, 149 U. S., 43.

Washington & C. R. R. v. McDade, 135 U. S. 554, and cases there cited.

Railroad Co. v. Stout, 17 Wall U. S., 657.

While it is well settled in Federal Courts that the presiding judge may sum up the facts to the jury and express an opinion upon them, he should take care to separate the law from the facts, and leave the latter in unequivocal terms to the judgment of the jury.

Starr v. United States, 153 U. S., 614, and cases there cited.

An instruction which has the effect to withdraw from the jury any matter of fact, which is open on the evidence, is erroneous.

Lessee of Jewell et al. v. Jewell et al., 1 Howard U. S., 578.

Patterson v. Jenks, 2 Pet. U. S. (C. Edi. 92)216.

Upon a statement of facts, the Court can not infer a substantive fact not agreed, though a jury might be warranted, under the circumstances, in finding that fact.

Binney's Lessee v. Chesapeake & Ohio Canal Co., 8 Pet., (Curtis Edi. 73, 214).

Tracy & Balestier v. Swantwont, 10 Pet. U. S. 80, (Curtis Edi. 26).

The Court, in his charge in this case, determined not only what the evidence was, but he also determined the effect of the evidence. Id. 30.

The Court should never so frame his instructions as to assume a disputed state of facts as proven. The rule is of equal application in civil and criminal cases.

Am. & Eng. Encp. of Law, Vol. 11, p. 254 (*d*).

Bank of Levenworth v. Hunt, Assignee, 11 Wall U. S. 391.

Ninth Assignment of Error.

The Court erred in his charge to the jury, in that he failed to present the phase of the evidence, which would have entitled the jury and required them to acquit the defendant. For which presentation, reference is here made to the full charge of the Court, contained in bill of exception No. 5. (R.,).

It having been proved by the defendant, or testimony tending strongly to prove that fact having been introduced by the defendant, that he, defendant, sent in jacket No. 6 to the postmaster at Waco, *two* registry packages, to-wit: Registry package No. 6, containing the $400, and registry package No. 7, containing the remittance to Ed. Strauss, at Waco; that he mailed same on the train at Thornton, and exhibited his hand to hand receipt from the postal clerk on train, and also registry bill receipt returned from Waco, signed by the postmistress at Waco, for said two registry packages, inclosed by him in registered jacket No. 6. To which omission the defendant in open Court excepted, and presented his bill of exception. See bill of exception No. 9. (R.,).

AUTHORITIES.

And the Court also failed to charge the jury upon the presumption of innocence, which was error.

The Court also failed to define to the jury reasonable doubt in his charge.

AUTHORITIES.

Cochran and Sayre v. United States, 157 U. S., 286.

Coffin v. United States, 156 U. S., 432.

Black v. State, 1 Texas Court of Appeals, 368

"In criminal trials the accused is entitled to the

benefit of the legal presumption of innocence, which, in doubtful cases, is sufficient to turn the scale in his favor." Hampton v. State, 1 Texas Court of Appeals, 652.

Eleventh Assignment of Error.

The Court erred in refusing to give in charge to the jury the special charge No. 2, to-wit: "The government in this case relies solely upon circumstantial evidence for a conviction of the defendant, and you are instructed in order to warrant a conviction of a crime on circumstantial evidence, each fact to the necessary conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts (that is facts necessary to the conclusion) must be consistent with each other, and with the main facts sought to be proved; and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offence charged, and must exclude every reasonable hypothesis save the guilt of the defendant.

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Refused. JOHN B. RECTOR, *Judge.*"

"In explanation to this bill it should be stated that it was in proof on this trial that defendant, as assistant postmaster, had the sole management and control of the money order business and money order funds of the postoffice at Thornton. By T. M. Wilson and J. W. Fullen, it was proved that he had exclusive possession of the mail pouch containing the registered matter in controversy, immediately before the time for mailing it. It was further in proof that the money order funds, of which defendant was in possession, was short $744.18.

This was proved by the auditor's statement and under Sec. 4046 R. S., made a *prima facie* case, and was direct evidence." R.

First Proposition Under Eleventh Assignment of Error.

When the inculpatory evidence is purely circumstantial, it is the duty of the Court to expound to the jury the nature and conclusiveness of such evidence, in order to warrant a conviction. It is part of the law of the case, and its omission in the charge is fatal to the conviction.

AUTHORITIES.

Com. v. Webster, 5 Cushing, 317-18.
Henderson v. State, 14 Tex., 503.
Powers v. State, 16 Tex., 546.
White y. State, 26 Tex., 347.

"It is not sufficient, in a case of circumstantial evidence, that the circumstances proved coincide with, account for, and therefore render probable the hypothesis of guilt. They must exclude, to a moral certainty, every other hypotheses, or the jury must acquit." .

Black v. The State, 1 Tex. Court of App., 368.

Mr. Burrill, in commenting on the rule of circumstantial evidence, says: "It is known, from experience, that the facts of cases are sometimes capable of explanation upon *more than one* hypothesis; or, in other words, that there is more than one hypotheses which will reasonably account for their existence. The great object of the rule is to ascertain whether such a state of things exist in the case under investigation, and to guard against its possible consequences; and it does this by fixing the grade of the belief or persuasion which is to be the immediate basis of the verdict, and requiring that it shall possess the quality of moral certainty. Now, as long as there is a single other hypothesis besides that which the mind, in the first in-

stance, inclines to adopt, which will account for the facts proved, and therefore *may be true* as well as the first one, it is obvious that this moral certainty, which is in its nature *exclusive* cannot exist under this rule; therefore other hypotheses, besides that which coincides with the *factum probandum*, (that is, other hypotheses proceeding upon the general idea of the innocence of the accused), must be sought for, and individually compared with all the facts proved, and rejected or excluded as incompatible with them, before the hypothesis of guilt is to be adopted, and the *factum probandum* held as conclusively proved."

Burrill Cir. Evi., 738.

Payne v. State, 12 Tex. Court of App., 283.

In the case at bar the proof tends very strongly, almost conclusively, that appellant enclosed the $400 in jacket No. 6, and it is not controverted, nor was it attempted to be controverted, that he delivered said jacket No. 6 to the railroad postal clerk at Thornton, and the proof of the fact that it, (the jacket No. 6, containing the $400 and the Strauss envelope), was received into the postoffice at Waco, and receipted for on the registry receipt bill by the postmistress (or in fact by Mrs. Wilber, for she signed Mrs. Conger's (postmistress) name to the receipt). In other words, the proof tends much more strongly to establish the fact that the money was received by Mrs. Wilbur, than that it was not sent from the postoffice at Thornton, which would raise a presumption at least that some other person than the plaintiff in error did embezzle that $400.

"It is no new principal of law of this State, that to justify a conviction upon circumstantial evidence alone, the fact relied on must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of guilt." If this be so, certainly a jury called to pass upon a case of that character should be informed of the rule as a

part of the law applicable to the case. An ordinary charge upon the law of reasonable doubt, copied from the statute, cannot convey to their minds a clear conception of this exaction of the law, when a conviction is sought upon circumstantial testimony alone; and without some definite rule for their guidance—a rule which will serve to impress it upon their minds, and cause them to weigh most carefully all of the facts, isolated or connected, from which they must reach their conclusion by reasonable inference—they are not unlikely in many instances, to found their verdict upon strong suspicion or mere probability, which will not suffice a verdict under the law.

Hunt v. The State, 7 Tex. Court of App., 210-235-236,

The decisions of the Courts of Texas make it the duty of the trial Court, where the guilt of the accused is dependent wholly upon circumstantial evidence, to apply the law applicable to such evidence, whether requested to do so or not, and a failure to do so is fundamental error, and will require a reversal of the conviction, although the error be not excepted to.

Burrill v. State, 18 Tex., 713.
Cave v. State, 41 Tex., 182.
Harrison v. State, 6 Tex. App., 42.
Hunt v. State, 7 Tex. App., 212.
Smith v. State, Id. 382.
Struckman v. State, Id. 581.
Ward v. State, 10 Tex. App., 293.
Ray v. State, 13 Tex. App., 51.
Wyers v. State, Id. 57.
Harris v. State, Id. 309.
Thomas v. State, Id. 493.
Connor v. State, 17 Tex. App., 1.
Black v. State, 18 Tex. App., 124.
Counts v. State, 19 Tex. App., 450.
Riley v. State, 20 Tex. App., 100.
Crowell v. State, 24 Tex. App., 404.

Twelfth Assignment of Error.

Be it remembered, that on the 20th day of April, 1895, the defendant filed the following motion to set aside the judgment rendered against him in the above numbered and entitled cause, and to grant him a new trial. See bill of exception No. 9. (R., p.).

For the errors set out above, the counsel for plaintiff in error respectfully submit that plaintiff has not had a fair and impartial trial, and most respectfully ask that the case be reversed and remanded.

PEARRE & BOYNTON,
Attornegs for Appellant.
RICHARD H. HARRISON,
Also on the Brief.

A. H. Garland
R. H. Garland for
Plaintiff in Error.

Office Supreme Court U. S.
FILED.
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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR DEFENDANT IN ERROR.

W. J. Foust, assistant postmaster at Thornton, Limestone County, Tex., was indicted under the name of W. J. Faust for the crime of embezzling, on April 6, 1893, $400, money-order funds of the United States. He was tried before Judge Rector and a jury, and convicted April 18, 1895.

His conviction was on the second count of the indictment, which count alleges that his Christian name is to the grand jurors unknown, and that he "was then and there assistant postmaster in a certain post-office theretofore established by the Postmaster-General of the United States, to wit, the post-office at Thornton, in the county

of Limestone, Tex., and as such assistant postmaster he, the said W. J. Faust, did then and there have in his, the said Faust's possession, power, and control certain money-order funds of the United States, consisting of" [etc.] "of the amount and value of $400; and he, the said W. J. Faust, being then and there in the possession of said money-order funds of the United States, of the amount" [etc.] "as such assistant postmaster at Thornton, did then and there unlawfully and feloniously embezzle and convert to his, the said W. J. Faust's, own use and benefit the said money-order funds described as aforesaid" [etc.].

The indictment is under § 4046 of the Revised Statutes, which provides, among other things, as follows:

> Every postmaster, assistant, clerk, or other person, employed in or connected with the business or operations of any money-order office, who converts to his own use in any way whatever, or loans, or deposits in any bank, except as authorized by this Title, or exchanges for other funds any portion of the money-order funds, shall be deemed guilty of embezzlement.

ARGUMENT.

We take up the assignments of error *seriatim*, omitting those which are not relied upon by plaintiff in error in his brief heretofore filed.

I. Defendant, before pleading, moved orally to quash the indictment on the ground that he was charged by the name of Faust and not Foust, which latter was his real name. His motion was overruled by the court, and this is assigned for error. There are various answers to the assignment.

A motion to quash is addressed to the discretion of the court, and therefore its denial can not be considered upon a writ of error. (*United States* v. *Rosenburgh*, 7 Wall., 580, 583; *United States* v. *Hamilton*, 109 U.S., 63; *Logan* v. *United States*, 144 U. S., 263, 282.)

Misnomer can not be taken advantage of by a motion to quash; there should be a plea in abatement. There is no defect on the face of the indictment. Counsel, after the prisoner had pleaded "not guilty," and, indeed, after the verdict, evidently perceived this, and therefore drew up a "plea of misnomer." The first bill of exceptions recites that "leave was then granted," in accordance with which he "presented his plea of misnomer" (p. 11). He was not allowed to file it *nunc pro tunc;* and he had waived his right to object by pleading to the merits. (1 Bish. New Crim. Proc., § 791.)

Moreover, the court held "that Faust and Foust were *idem sonans*" (p. 11). The court heard the words pronounced, and was a better judge of this matter than persons who only see the words in print. The ruling seems to be correct. If Foust is pronounced like "oust," it is certainly *idem sonans* with the name pleaded, as that name is customarily pronounced. (See *id.*, § 792, note.)

Had there been any error here, it would be cured by the verdict. (Rev. St., § 1025.)

II. It was proper, in making a *prima facie* case against defendant, to put in evidence the transcript from the money-order account books in the office of the Auditor

at Washington. Rev. St., § 4046, provides in part as follows:

> Upon the trial of any indictment against any person for such embezzlement it shall be *prima facie* evidence of a balance against him to produce a transcript from the money-order account books of the Sixth Auditor.

It will be noticed that this section does not require the name of the defendant to be stated upon these account books. The accounts are kept with the postmaster, while the statute expressly applies to indictments against any assistant or clerk. The transcript is made fully competent in this case by the following statement in the second bill of exceptions (p. 12):

> It was proved on the trial that the defendant was the son of J. E. Foust, was assistant postmaster during the entire term of said J. E. Foust, and as such had the sole management, control, and possession of the money-order business and money-order funds during said entire term.

III. This bill of exceptions relates to the exclusion of some exceedingly remote testimony. It is attempted to be made relevant by statements in the assignment of error (p. 6), which are not based upon anything in the bill of exceptions (p. 12). Part of the evidence offered is very clearly incompetent, namely, the indictment, conviction, and sentence of a certain postal clerk for embezzling certain money-order funds more than six months prior to the period in question. The balance of the evidence offered was so very remote that it seems hardly necessary even to refer to *Alexander* v. *United States* (138 U. S., 353, 356) and *Moore* v. *United States* (150 U. S.,

57, 60), holding that the rejection or admission of circumstantial evidence of this nature is within the discretion of the trial court.

VIII. It is unnecessary to consider this bill of exceptions, because it contains no exception. (*Alexander* v. *United States*, 138 U. S., 353, 355; *Tucker* v. *United States*, 151 U. S., 164, 170.)

IX. This is an exception to the failure of the court "to present to the jury the faze [*sic*] of the evidence which would have entitled them to acquit the defendant;" to its "failure to present the theory of the defendant." There was no request to charge. The exception is unavailable. (*Isaacs* v. *United States*, 159 U. S., 487, 490.)

XI. This is an exception to the court's failure to give the following instruction (pp. 21, 22):

> The Government in this case relies solely upon circumstantial evidence for a conviction of the defendant, and you are instructed, in order to warrant a conviction of a crime on circumstantial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts (that is, facts necessary to the conclusion) must be consistent with each other and with the main facts sought to be proved, and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged, and must exclude every reasonable hypothesis save the guilt of the defendant.

The court had already charged as follows (p. 15):

> If you have a reasonable doubt as to the guilt of the defendant, you will give him the benefit of that doubt and acquit him.

This request called upon the court to go further and charge not only that the whole case must be proved beyond a reasonable doubt, but that "each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt."

Assume that there are twenty different circumstances in the chain of evidence, each necessary to the conclusion; that each of these is proved by a considerable preponderance of evidence; that as to each one of them there is, standing alone, a reasonable doubt; but that the preponderance of evidence is in each case so strong, and they are all so connected together, that it is impossible to believe that defendant is not guilty, although there may be a reasonable doubt as to any one out of the twenty circumstances, if it could be considered alone. Is it defendant's contention that the jury are bound to acquit, although they may unanimously believe that defendant is guilty beyond a reasonable doubt and beyond the shadow of a doubt? If so, then it is respectfully submitted that no such unreasonable doctrine forms any part of our criminal law. Is it the contention merely that they must acquit unless each necessary fact is proved beyond a reasonable doubt, *either* independently *or* in part by inferences arising from the proved existence of the nineteen other circumstances? If so, then it is submitted that the request is unnecessary and could not assist the jury, while it might mislead them.

Mr. Bishop says that the doctrine as to reasonable doubt upon the issue of guilty or not guilty "extends to and comprehends each and every particular of this issue when considered in combination, but the jury need not split the particulars of the issue and find each severally beyond a reasonable doubt." (1 Bishop's New Criminal Procedure, § 1093.) He apparently means that each *ultimate fact*, as distinguished from each *evidentiary fact*, must be established beyond reasonable doubt. (See *Graves* v. *People*, 18 Colo., 170, 185.) Thus in the case at bar it must be established beyond reasonable doubt that Faust was a Government employee, that he embezzled funds, and that they were money-order funds and belonged to the Government.

The somewhat conflicting decisions of the courts on this subject are reviewed by Judge Thompson. (2 Thompson on Trials, §§ 2511–2519.) He criticises the Illinois rule as formulated in *Bressler* v. *People*, 117 Ill., 422, 437:

> The jury are instructed that the rule requiring the jury to be satisfied of a defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. It is sufficient if, taking the testimony all together, the jury are satisfied beyond a reasonable doubt that the defendant is guilty.

He criticises this as follows (§ 2514):

> The reasoning * * * involves the solecism that, although the circumstances do arrange themselves in the form of the links of a chain, yet that

> when one link of the chain is broken the chain itself may still remain entire—ignoring the obvious conception that no chain can be stronger than its weakest link.

It is respectfully submitted that the learned jurist's criticism is due to overuse of his simile. No physical chain can be stronger than its weakest link, no matter how many links there are, but a chain of evidence or deduction, if there are links enough in it, may afford an overwhelming presumption which almost takes the place of the weakest link. In fact, there are always altogether missing links in a chain of circumstantial evidence when thoroughly analyzed. (*Clare* v. *People*, 9 Colo., 122.) "Out of the domain of the exact sciences and actual observation there is no absolute certainty." (*Hopt* v. *Utah*, 120 U. S., 430, 439.)

He also seems to assume that a link of evidence is broken if not proved beyond a reasonable doubt, and to assume likewise that proof beyond a reasonable doubt is something capable of exact measurement by ohms or horsepowers. On the contrary, the degree of evidence necessary to proof beyond a reasonable doubt varies with each case. The degree necessary as to every link depends on the number of other links proved, the closeness of their interdependence, and the degree of certainty with which their proof is established. If the jurymen should endeavor to disregard these evidentiary elements they would be unfit to sit on a jury.

It is submitted that the trial judge in the case at bar was eminently right in protecting the jury from this scholastic discussion, and charging them simply that they

were to find beyond reasonable doubt that defendant was guilty as charged in the indictment. The State has as much right to complain of such analysis as the prisoner has to complain of instructions that the defense of *alibi* or of insanity must be established by a preponderance of evidence. To apply the principles of *Allen* v. *United States* (150 U. S., 551, 561), it would have been error to direct the attention of the jury to the contemplation of the philosophy of mental operations, even their own; it was right to leave them to decide "in view of all the circumstances developed in evidence, uninfluenced by metaphysical considerations proceeding from the court."

In *O'Connell* v. *People* (87 N. Y., 377), and *Walker* v. *People* (88 N. Y., 81, 89), the court applied the principle for which we contend, even to the ultimate facts in the case, holding that—

> Where the judge properly submits to the jury a proposition covering the whole issue, and instructs them that they must find it beyond a reasonable doubt, he can not be required to subdivide it and charge separately as to each of the elements necessary to constitute the crime; that it must be established beyond a reasonable doubt. * * * When the judge gives to the jury in his charge the true rule applicable to the case, when it comes to be considered on all the evidence, it is not error to refuse to submit a separate proposition, which, even though correct in itself, is only calculated to confuse the jury by distracting their attention from the test question, which is to be determined on the whole evidence.

In *Mullins* v. *People* (110 Ill., 42, 47) the court said:

> The "reasonable doubt" the jury is permitted to entertain must be as to the guilt of the accused on the whole evidence, and not as to a particular fact in the case.

Recent cases to the same general effect are *State* v. *Myers* (40 Pac. Rep., 626; Wash., June, 1895); *State* v. *Wells* (111 Mo., 533); *Jamison* v. *People* (145 Ill., 357).

XII. No exception lies to the denial of a motion for a new trial. (*Moore* v. *United States*, 150 U. S., 57, 61; *Holder* v. *United States*, 150 U. S., 91; *Wheeler* v. *United States*, 159 U. S., 523.)

It is respectfully submitted that the judgment should be affirmed.

EDWARD B. WHITNEY,
Assistant Attorney General.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

No. 130.

GEORGE A. EDDY AND H. C. CROSS, AS RECEIVERS OF THE MISSOURI, KANSAS AND TEXAS RAILWAY, PLAINTIFFS IN ERROR,

vs.

BEN. F. LAFAYETTE AND SALLIE M. HAILEY, DEFENDANTS IN ERROR.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JUNE 30, 1892.

(15,071.)